91-1341

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1) May a court of appeals depart from, from the tenets established by this Court in Conley v. Gibson (1957) 355 US 41, Foman v Davis (1962) 371 US 178 and Gomez v Toledo (1980) 446 US 635, returning us to the days when a single mistep in pleadings was fatal while pretending otherwise?

2) May it construe the language of a complaint, selectively, against the pleader on a motion to dismiss, refused to allow amendment prior to the filing of any responsive pleading knowing full well that such amendment would correct the purported deficiencies in the complaint and ignored those parts of the complaint that are clearly sufficient ?

3) While noting that it is well aware, as was the district court, of the court rule which was the focus of the 42 USC 1983 and 1985 complaint, may it, nonetheless, refuse to allow consideration of

this District of Columbia rule, even while acknowledging its awareness of it as the basis of the generalized allegations of the complaint, knowing that the consideration of it in the case would clearly make the complaint viable, even were its criticisms of the complaint valid?

4) May the general allegations of the pleading referring to the court rule in question be simply ignored by selective reading of the complaint so as to favor the defendants ?

5) In the process also, in the guise of solving a "jurisdictional" question which had long been answered, may the court of appeals consciously place the plaintiff's ensuing Rule 60 (b) motion and proposed first amendment of right filed in conjunction therewith (nothing but dismissal motions ever having been filed and there having been unacted upon motions to stay outstanding during the entire time) in a

limbo where it remains unacted upon by the district court in a manner that makes it clear that it will not be acted upon, thus deciding the Rule 60 (b) motion by "killing" it while pretending not to?

6) May the court of appeals depart far from this Court's decision in Lugar v Edmondson Oil Co., Inc. and sanction the use of unconstitutional pre-judgment procedures that not only enable the attachment of a man's business without due process but allow it to be seized in its entirety in flagrant violation of due process through the very procedures of a court?

7) May it refuse, upon petition for reconsideration, to apply to this case the decision of this Court, (intervening between oral argument and the opinion) in Edmonson v Leesville Concrete Co. which requires an analysis of the extent to which the state (in this case D.C.) government "delegated some portion of ...

power to private litigants" to allow deprivation of federal statutory and constitutional rights "to occur within the courthouse itself" "through explicit statutory authorization."?

8) May the court of appeals twist the famous ruling of Conley that no dismissal should be allowed unless no set of facts can be shown to prove plaintiffs' claim to mean that dismissal will be allowed if but the underlying facts of the plaintiffs' claim and their merits can be avoided?

9) May it ignore the right of a complainant to file one amendment as a matter of course before a responsive pleading has been filed and twisted the famous ruling of Foman that prejudice to parties opposing amendment must be demonstrated before dismissing when absolutely nothing has happened in the case. (In this case nothing had happened because of two motions to stay filed by plaintiffs pending the out-

come of related litigation before the same judge, an outcome greatly affecting the 42 USC 1983 and 1985 questions which that judge simply never got around to ruling upon before dismissing the present case without any allowance for further briefing and affidavits in light of the outcome of that other case, decided in favor of the principal plaintiff)?

10) May, relying upon past decisions of his own, the appellate judge create a new rule that there is only a limited number of situations in which amendment of civil rights pleadings will be allowed ?

11) Is there a line beyond which stated bias to "manage" a man's litigation so as to kill it becomes violative of that litigant's rights?

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THANH VONG HOAI, et al.
v.
THANH VAN VO, et al.

Petition for a Writ of Certiorari

I. Hoai v Vo (CA DC 1991) 935 F2d 308; related case before same judges: Hoai v Sun Refining & Marketing Company, Inc. (CA DC 1989) 866 F2d 1515

II. The grounds on which the jurisdiction of this Court are invoked are:

1) The Court of Appeals for the District of Columbia Circuit has rendered an opinion which conflicts with the decisions of this Court, including Conley v Gibson (1957) 355 US 41, Gomez v Toledo (1980) 446 US 640, Foman v Davis (1962) 371 US 178, Lugar v Edmondson Oil Co. (1982) 457 US 922, Edmonson v Leesville Concrete Co.(1991) 500 US ____, 114 Led2d 660, Scheuer v Rhodes (1974) 416 US 232, Hospital Bldg. Co. v Trustees of Rex Hospital (1976) 425 US 738, and Fudge v Penthouse International, Ltd. (1988) 109 S.Ct. 65.

2) The Court of Appeals has departed from the accepted and usual course with which civil rights complaints, litigants and cases are treated under the above cases and with regard to the consideration of stay motions, conversion from Rule 12 (b)(6) to Rule 56 where required and with regard to the considering and treating the issues raised by the parties.

3) The Court of Appeals has decided this case in a manner, with regard to the above which appears to conflict with decisions by other United States Courts of Appeal.

4) There are issues not decided by this Court that should be.

III. The judgment sought to be reviewed was contained in a memorandum opinion decided June 11, 1991.

IV. Rehearing denied Nov. 19, 1991.

V. Constitutional provisions: Amendments 1, 5, 7. Statutes: 42 USC 1981, 1982, 1983, 1985(2) and (3). D.C. Bar Code of

Ethics as adopted by the D.C. courts. D.C. Superior Court rule 12-I(b) as then in existence, Rule 65. See appendix.

VI. STATEMENT OF THE CASE

Jurisdiction in the district court was based on 42 USC 1983, 1985, 28 USC 1343.

This is the case of Hoai. The other two plaintiffs-petitioners are his attorney at the beginning of the incidents in question, John D. Hemenway, and the latter's son, David Hemenway, who was acting as Hoai's agent. Hoai is American but from Viet Nam. On April 10, 1986 he opened a Sunoco franchise in the District of Columbia at 2305 Pennsylvania Avenue, S.E. which he had been awarded.[1] About a month before opening the station Hoai had assisted his wife in reopening and getting going another business, a food mart, which

[1]Background facts are taken from the compant in this case and in Hoai's RICO case in the Eastern District of Virginia, which was in this case as an attachment to the J/D motion to dismiss. A-371, A-479

had been dormant, in Arlington, which the Hoais believed they were purchasing for Mrs. Hoai to run while Mr. Hoai ran the station. Hoai applied for the franchise, which had been vacant, in February, 1986 and was awarded it in March over other applicants. While he was waiting, two other Vietnamese, Minh and Luu, persuaded Hoai and his wife to take over the Asian food shop because Minh and Luu claimed they were too busy with a real estate development they owned in Philadelphia to run the mart. The Hoais protested that they were too tied up, as was their capital, in the franchise to become involved in the food business. By promises of financing from one Thach, who, Minh and Luu claimed, owned and was president of a bank, Minh and Luu persuaded Hoai and his wife to buy the food business on a loan-leveraged basis. Minh and Luu assured the Hoais that, since the food business generated a

steady stream of cash, money used in it could be increased and fed into the gas station as needed. Also at this time, one Vo, who claimed to be a wealthy Vietnamese construction contractor, offered to assist Hoai with any "loan" he needed to start up the Sunoco franchise. Hoai as it turned out also knew and was intimate with Thach, the alleged banker. While waiting for the loan for the food business from Thach, the "banker", the Hoais were persuaded to enter the food business and begin to operate it in March of 1986 in order to help out Minh and Luu, who claimed not to have the time to run that business, what with their important new project in Philadelphia. Mrs. Hoai was to operate it and Mr. Hoai was only helping out until he could open the Sunoco station a few weeks later.

Vo claimed to be putting up a loan for half the capital needed to start up the station over its first months, $35,000.,

by placing it in an account in "Thach's" bank which he opened in his, Vo's name, only, explaining that he needed to control the account and the proceeds of the station to secure his "loan."

It soon became apparent that all was not as represented to the Hoais by Thach, Vo, Minh and Luu. Despite early success by the Hoais in getting both businesses up and running, problems soon developed and both were taken by Minh, Luu, Thach and Vo, by a combination of trickery and threats of violence, including murder.

Sunoco knew of these things because its area representative, Ernest Peele, had noticed Hoai's absence from his station and had questioned him about them. Peele acknowleged in court that he had been informed of the threats against Hoai and emphatically rejected the claims of Vo to have bought the station for one dollar in a contract that Sunoco had not been ad-

vised about ahead of time. Sunoco sent Hoai a letter making it clear to him that his franchise agreement required him to be in the station managing it, a letter whose implications for the loss of his franchise were not lost on Hoai, who hired counsel and sought to regain his station, with the professed support of Sunoco, who continued to tell him that he was their dealer. The Jones, Day attorneys, Roseman and Ottman, learned of these things in the TRO proceeding in the Superior Court of the District that later ensued. Hoai an attempt to get Vo and Vo's thugs to leave the station in June that was unsuccessful and then hired an attorney, a fellow Vietnamese, who ultimately turned out to be working for Minh and Luu. Finally, Hoai fired her upon discovering her complicity with his tormentors.

On August 25, 1986, Hoai, accompanied by the two Hemenways, and carrying the notice

to surrender the premises that is required to be preliminarily given an occupant of land under D.C. procedures, reentered the station and asked the people in it at the time, all Vo employees, to leave, which, to the surprise of John Hemenway, they did. Vo was not present at the time but was in communication with his then-attorney, Arif, and Thach, who soon appeared. An agreement of settlement and compromise was worked out between the parties under which Vo and Hoai agreed that they would abide by the decree of Ernest Peele, the Sunoco Area Representative, who was to come to the station the following morning, the morning of August 26, 1986, as to who was <u>the</u> dealer of Sunoco at the site. The party, as between Hoai and Vo, who was not the dealer was to receive value for any actual contribution in money made to the business pursuant to an inventory taken mutually.

Ernest Peele came the following day and declared that Hoai was the Sunoco dealer and again repudiated Vo's claims to the contrary, as he had in the past. An inventory was begun, with Arif participating for Vo, but was soon discontinued. Instead Vo prepared, without the knowledge of Hoai and Sun at that time, a complaint against Hoai, Sunoco and both of the Hemenways. It is in connection with the filing of this complaint in the Superior Court of the District of Columbia by Vo d/b/a Suntech Sunoco against, the accompanying TRO motion and the proceedings that ensued that the causes of action in this case arose.

First, in planning the TRO attempt, Vo, together with attorneys Roseman and Ottman and their firm, Jones, Day, successfully used the color and authority of the canons of legal ethics of the District of Columbia bar, as officially adopted in opinion

by the District of Columbia Court of Appeals, to force John D. Hemenway to have to cease representing Hoai at the TRO hearing and to force Hoai to give up his counsel of choice in that proceeding. Hoai and Hemenway were forced to call in new counsel late in the evening for a hearing the next morning, counsel completely unfamiliar with the facts and circumstances of the case and that had a devastating and damaging effect. This was achieved by Vo, Roseman, Ottman and the Jones, Day firm, by naming Hemenway in bad faith as a defendant, allegedly having violently entered the station and engaged in acts such as theft of cash. Mere false swearing is not actionable. The gravamen is that the canons as adopted by the D.C. Appeals court are customarily applied by the Superior Court in a procedure which has no safeguards against unconstitutional deprivations. False swearing and bad

faith acts go to intent in using the unconstitutional procedures. The civil rights violation was using the canons as adopted by the highest court of the District and as embodied in the Superior Court customary practice to strip Hoai of counsel of choice and Hemenway of his right to associate with Hoai as counsel. This was done by filing the TRO, inviting Hemenway to the TRO hearing by phone an hour before, serving him upon his arrival with a complaint naming him a defendant, having specifically asked him to come as Hoai's counsel and then, upon his arrival, using the canons to force him out of the case as counsel and compel Hoai to have to bring in someone totally unprepared and unfamiliar with the case at the last minute. The use of these canons in the District permits the disqualification of one's opponent's counsel on the flimsiest

of made up stories.[2] It permits it without any opportunity whatsoever for the cross-examination of those making the accusations upon which the disqualification is based. It, in short, permits litigants to eliminate their opponent's counsel of choice by the bad faith tactical maneuver as was done in this instance. But it is not the bad faith that violates 42 U.S.C. 1983, it is the procedures, or lack thereof, and the practice and custom in the D.C. courts that permits such maneuvering, which, even when overturned on appeal, still does enormous damage to litigants, sometimes causing them to lose their case without any due process through the actual procedures of the case itself at all,

[2]In this case there was, by happenstance, an off duty D.C. police officer, Officer Teddy Gonzalez, in the gas station when Hoai and the Hemenways arrived and shortly thereafter other officers were summoned. Thus there were officers there at all times, all of whom swore that no violence such as was alleged in the complaint against Hemenway occurred.

strictly through a collateral procedure.

A TRO hearing was held with emergency counsel thrust in at the last minute for Hoai in place of Hemenway. Vo was granted a TRO, ignoring the only testimony put forward live and subject to cross-examination, which was that Vo was a mere scrambler who had no legitimate claim to the station. This was done when the judge at the TRO interrupted the argument and imposed upon the case sua sponte a theory of local landlord and tenant law which she felt overruled threats of violence, due process and other federal rights. She was later ratified in this by other Superior Court judges. This sua sponte imposition upon the case instructed counsel for Vo, the defendants Roseman, Ottman and Jones, Day, to add to their original theory in their complaint -- of common law conversion -- a theory of wrongful eviction, one based upon the notion that local landlord

and tenant law could override the federal law governing franchise terminations.

The TRO was granted subject to a condition of a cash bond in the amount of three thousand five hundred dollars for the purpose of protecting Hoai. But, as is the custom and practice in the Superior Court, despite pronunciations to the contrary, no cash bond was required. Instead, Attorney Ottman was allowed to proffer his own check in its stead, which he in fact never gave. Instead Vo was allowed to "pay" his bond with an insufficient funds check drawn on the account he had set up and controlled as part of his fraud to wrest the gas station franchise illegally from Hoai in the first place. The check was never made good while the TRO was in effect and the damage was done and, though ultimately made good for a while, was allowed to be returned to Vo over the protest of Hoai and the Hemenways as is

the practice and custom of the Superior Court. Security for injunctive relief consisting of seizure of property before trial is a fundamental due process right. Local custom and practice of the Superior Court with regard to bonds makes it meaningless and violates this right.

Finally, and this is the principal gravamen of the case: Hoai was promised by the TRO judge on the record that he would have a follow-on preliminary injunction hearing pursuant to Rule 65 at which he could make his case. Her TRO after all was only based on the technicality that, as she saw it, even if he had a right to evict Vo he had to do so along with Sunoco under the summary judgment procedures of the Landlord and Tenant Branch of the Superior Court. Superior Court Rule 65 is federal rule 65 with only slight modifications not pertinent here. However, at that time the Superior Court had another

rule (whose applicable provisions have since been repealed and replaced with others closing the unconstitutional loophole thus created) which allowed attorneys who would do so to effect very nearly anything they wanted ex parte in a completely unconstituional manner and, in this particular case, to not only attach Mr. Hoai's gas station prior to judgment without any hearing on the merits but to actually take it from him altogether and give it to Vo, the intruder and scrambler, as the dealer in his stead. Sunoco, rather than put up with the bother of a Rule 65 proceeding and standing by Hoai as it had stated theretofor that it would, instead cut a secret deal with Vo and his attorneys Roseman and Ottman of Jones, Day behind the scenes and did this through Wagner, Zulli and Forester. Persuaded by Roseman that there was a practice and method in the Superior Court by which the

tiresome requirements of an actual Rule 65 hearing with due process and all that could be dispensed with, the attorneys for Sunoco agreed with Vo and his attorneys to use the Judge-in-Chambers proceeding established by Rule 12-I(b) of the Rules of the Superior Court of the District of Columbia as it then stood. That rule then provided, at 12-I(b) as follows:

> The following matters may be presented for disposition to a Judge in Chambers designated by the Chief Judge, either ex parte or with opposing counsel, as appropriate: ... motions for temporary restraining orders,... and any other matters appropriate for such disposition.

Neither this rule nor any other part of the rules of that court as then in being, nor any custom or practice of that court at that time, put any restraint or safeguards of due process on this unfettered power of the Judge-in-Chambers to

do whatever he personally felt was appropriate ex parte. Attorneys could, and did, as this case proves, take advantage of this lack of standards and restraints to do whatever they felt would please their clients including, as in this case, taking another man's business from him altogether and obtaining it for their client without any notice to or opportunity to participate by Hoai as the party most affected. This rule was taken advantage of jointly by Sun and its attorneys and Vo and his attorneys. They drew up a private agreement which they entitled an extension of the expiring TRO, falsely claimed on its face that it did not affect Hoai, though even the slightest actual inquiry would have shown that to be false, and had it entered as a consent order by the Judge-in-Chambers, who signed it without making a record of the request or any communications that took place.

To a great degree the subsequent course of this proceeding revolves around these acts by which Sunoco switched sides, abandoned Hoai and joined forces with Vo to give the franchise to Vo in Hoai's stead. In particular what ensued in the district court and appeals court revolves around the failure of the plaintiffs below, though alleging that all of these things were done under the color and authority of the laws and rules and practices of the Superior Court, to specifically name Rule 12-I(b) as then constituted in so alleging while simultaneously alleging that, as well as being done under the color and authority of the laws and customs of the Superior Court these things were done in violation of D.C. as well as federal law.

In addition, because Hoai and the Hemenways were sued in the Superior Court they at first fought these matters there. They removed the case to the U.S. District

Court based on the PMPA and were remanded. Ultimately, as the PMPA one year statute of limitations neared its end, Hoai filed suit under the PMPA against Sun in the district court, where, after an attempt by the judge to get rid of the case was reversed in the court of appeals, Hoai won a summary judgment on liability and then a jury trial on damages. In the meantime, however, and while the cross motions for summary judgment in the PMPA case were pending (for a year and a half), the statute of limitations on the civil rights claims also began to run. Accordingly, as matters in the Superior Court had stalled, the plaintiffs-petitioners bought this civil rights suit. The defendants moved to dismiss under Rule 12 (b) (1) and (6) for alleged lack of proper service and failure to state a claim. The Sun defendants filed one such motion and the Jones, Day (J/D) defendants another. Vo

filed a separate, echoing, motion. The J/D motion in particular was accompanied by voluminous material outside the complaint.

This material was relied upon by the judge, the same judge who had the PMPA case before him. Plaintiffs filed token oppositions but, most importantly, filed motions to stay matters in this case until after the then pending summary judgment decision in the PMPA case was made, so that the full impact of that case and all its proceedings, including discovery, might be absorbed into the civil rights case in the interests of judicial economy and resolution of a number of issues in this case, at which time, presumably, the requisite formal conversion to a Rule 56 proceeding with full opportunity to respond to the materials outside the record and brief fully and amend would occur. These motions for a stay, though fully briefed, were never acted upon by

the district court judge. Instead, while sitting on the cross-motions for summary judgment between Hoai and Sunoco in the related case, he conceived and executed a plan whereby he granted the plaintiff Hoai summary judgment on liability in his PMPA case (a result largely dictated by the intermediate reversal he had experienced at the hands of the court of appeals and the opinion issued by the appellate panel) and, on the very same day, dismissed the civil rights action of Hoai and the Hemenways without allowing them any opportunity to respond to the material outside the pleading or amend. In so doing he made no conversion to Rule 56 as required and completely ignored their outstanding motions to stay and has never decided those motions. Simultaneously, and in the same order dismissing the cases without opportunity to amend, he issued a show cause to the plaintiffs counsel demanding that

they show cause quickly as to why they should not be sanctioned for having brought suit. He knew in doing this, for it was on the record before him, that Mr. Hoai's counsel were operating virtually without funds and that Sunoco's counsel was being paid hundreds of thousands of dollars per annum. This dismissal opinion was taken without independent analysis from the dismissal motion of the Jones, Day defendants. The sanction threat has been allowed to hang over the heads of counsel ever since, including during the trial of the PMPA case damages. It was partially pursuant to a supplemental request by Sunoco that the counsel for Hoai be sanctioned, inter alia, for answering a reporter's questions.

This dismissal was appealed. A Rule 60(b) motion for reconsideration was also filed and, eventually, in connection with that motion, a motion to amend if the

lower court were inclined to grant the Rule 60 motion. The Court of appeals held a hearing and avoided the issues discussed above as raised in the briefs before it altogether when the leader of the panel introduced an issue not briefed on the pretense that it had not been decided in the circuit as to whether a Rule 60 (b) motion tolled an appeal. The panel then indicated that if the plaintiffs wanted they could withdraw their appeal and the matter would be remanded to allow consideration of the Rule 60(b) motion. Plaintiffs-petitioners readily agreed, while protesting that the law on the jurisdictional question had been long-settled. However, the Court of Appeals did not do what it indicated on the record it would do. This, it turned out, was a diversion to distract from the issues briefed. Instead it affirmed the lower court's dismissal. In so doing the appel-

late judge posited a new rule which would make Foman v. Davis an empty shell, based in part on his own prior decisions. Under this rule, instead of having to show why amendments should not be allowed, they will only be allowed in special situations as defined by this particular judge. In addition, the opinion tried to get around the fact that it directly contradicted the intervening decision of this Court in Edmonson v. Leesville Concrete and made it clear to the lower court that it could treat the then pending Rule 60(b) motion as a dead letter, which it readily did. Simultaneously, the appellate court refused to allow into the record both of the reply briefs petitioners filed in response to the two oppositions with which they were faced and excluded from the record also a supplemental appendix. Whereupon this petition ensued.

VII. REASONS FOR ALLOWANCE OF THE WRIT

In the tortuous history of this case there is an attempt to develop a doctrine in direct conflict with leading decisions of this Court under 42 U.S.C. 1983, and the civil rights laws generally as well as important procedural rights. The most important is the famous question of whether, under federal pleading rules and practice, a single misstep (if such it be) will be fatal or whether the long standing rule of Conley v Gibson, supra will be adhered to. In this case the determination of the lower courts not to see the merits of the plaintiffs' claim, and, in particular, the claim of Thanh Vong Hoai, assumes the aspect of what social scientists call "avoidance" behavior. The result has been a departure from the accepted and usual course of judicial proceedings under long-accepted landmark decisions of this Court, the sanctioning of that departure by an

appellate court, and serious conflict with applicable decisions of this Court.

The petitioners, Hoai and the Hemenways, have sought to focus attention on the simple fact that though their complaint did not specifically mention the since repealed provisions of D.C. Superior Court Rule 12-I(b) as it then was at the time of the events complained of, the rule whose existence was what enabled the taking of Mr. Hoai's Sunoco franchise and the giving of it to Mr. Vo with the effect of an act sanctioned and blessed by the courts of the District, it was there, it was known to all parties, and clearly their allegations in the complaint could have referred to no other procedure. Respondents knew of the procedure and knew it was what was being complained about. They were "on notice" , because they had used it to accomplish the acts complained of and could have accomplished them in no other way.

Both the District Court and the Court of Appeals went out of their way to avoid discussing or addressing whether, if the rule were to be specifically alleged in the complaint, the complaint would have been non-dismissible, an effort which one would have thought was barred by the decision of this Court in Conley v Gibson and the many other decisions since Conley that have reiterated and expanded the rule of federal "notice" pleading. Both insisted that the complaint stated no claim and went out of their way to foreclose any possibility that its defects might be cured by amendment. In the end they worked together to assure that there would be no such cure and that the merits of the claim would be buried without ever being considered, seemingly the opposite of what this Court and most other circuits have been saying for the last forty years is the guiding principle in federal courts.

In order to achieve this "failure to see" both courts had to engage in considerable diversionary effort, effort which does no credit to the judicial system and undermines the decisions of this Court and the usual practices under federal "notice" pleading. Primary among these diversionary efforts was a very simple technique of failing to read the complaint as a whole and failing to read, in particular, those parts of it which carried the gravamen of the charge. In so doing both courts seriously undermine not only the procedural precedents referred to but also the decision of this Court in Lugar, supra.

After Lugar clients and attorneys were on notice that the reign of the "courthouse" gangs was no longer to be what it had been. No more would the simple fact that a procedure could be found in state law which avoided the tiresome necessity of having to prove the merits of one's

case before attaching or seizing the property of another be sufficient to protect those who used it. If the procedure was violative of due process, its employment would subject the users to potential liability under 42 U.S.C. 1983.

Since practically all pre-judgment attachment statutes, whatever their formal name, have some procedures to protect against violations of due process, including restrictions on when and against whom they might be employed, provisions requiring the posting of a bond, provisions for immediate hearings to demonstrate their lack of merit, etc., the natural question arises: What about a procedure which, while not denominated a pre-judgment attachment as such, allows a party nonetheless, to use the power and authority of the court to effect the same result; further, what if that procedure allows not only the attachment of property without a

hearing, notice or any other form of due process, but even allows the person's property to be taken from them and given to another. In the abstract, in the light of Lugar, it would seem that the answer to such a question would be obvious. It is true that in Lugar this Court said that it was confining its decision to the pre-judgment attachment context, but this Court clearly was not sending a signal that clever attorneys and their clients might find alternative court procedures that allowed even a more drastic result prior to trial without consideration of the merits of the cause or due process of even the most rudimentary kind and permitted not only the attachment but the seizure of another man's property. Why, then, were such great lengths gone to here by both levels of courts to avoid the obvious application of the Lugar principle and why does the course thus charted so

seriously challenge Lugar and other applicable decisions of this Court and the Courts of Appeals in other circuits ?

The answers are only clear if we start at the beginning. It is always the case that a challenge to such a procedure and its use will also involve challenges also to local law as well. No counsel filing a civil rights complaint for a Lugar type violation of 42 U.S.C. 1983 which uses state court procedures to effect seizure of property prior to any decision or hearing on the merits and completely without due process is going to give up his claims that the procedures resorted to violated state law as well as federal rights. In Lugar itself, for example, Lugar was able to show eventually that the attachment of his truck stop was violative of Virginia procedures as well as violative of his federal rights. Yet the position of both courts in this case was to ignore that the

complaint alleged both violations of D.C. law and of federal law under the color and authority of the rules, practices and procedures of the Superior Court. Seizing upon the allegations of violations of D.C. law in the use of the D.C. procedures which were challenged as violative of federal rights, both courts below completely diverted from, and managed to deliberately ignore, the allegations of the complaint that these same actions were taken under color and authority of the rules, practices and procedures of the Superior Court and were only enabled by those procedures.

The complaint makes the allegation, in para. 38, that the consent order of the Superior Court by which Hoai's franchise was taken from him was represented by the attorney defendants to Sun management as being "under the law of the District of Columbia", necessarily implying that it was procedures of that court that were in-

voked. Para. 40 alleges that the consent order was signed, through the efforts of the defendants, by a Superior Court judge, thus implicating the procedures of that court whereby, at that time, such signatures were obtained. Any doubt on that score is removed by para. 42,[3] which alleges that though the signing of the consent order did not represent any independent judgment of the Superior Court, "Nonetheless, it was done under the color and authority of the Superior Court and its rules and the laws governing it as well as its customs," and then alleges that the defendants held out that it was the Superior Court that required this result, again necessarily implicating the procedures of that court which were ac-

[3]We refer here to the first para. 42, the one in the general, preliminary factual allegations preceding the counts of the complaint proper. Due to computer composition error the paragraph numbers 42 through 44 are repeated in Count One. We will distinguish them, for purposes of this petition by the prefix I-

tually used. Para. 43 focuses on how the defendants used this technique to give their private arrangement the color and authority of the "laws, regulations and customs of the District of Columbia". Then, in the formal allegations of Count One charging specifically the violation of 42 U.S.C. 1983, the plaintiffs further alleged that, while their actions violated the laws and practice of the District as well as federal laws and customs, nonetheless, the defendants "schemed and planned to evade those requirements and to instead use the very color of law and apparent authority of the Superior Court to deprive Hoai of his rights, privileges and immunities." I-44 (emphasis added) Again, in para. I-45 it is alleged that this was done "by the color and authority of the laws of the District of Columbia governing its courts and judicial processes."

Thus, the requirements of 42 U.S.C. 1983 pleading as set out by this Court in Gomez v Toledo, supra are met, viz.:

> By the plain terms of § 1983, two -- and only two -- allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 U.S. 167, 171, 81 S.Ct. 473, 475, 5 L. Ed.2d 492 (1961). Petitioner has made both of the required allegations. He alleged that his discharge by respondent violated his right to procedural due process, see Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) and that respondent acted under color of Puerto Rican law. See Monroe v. Pape, supra, at 172-187, 81 S.Ct., at 476-484.

In the present case the Court of Appeals did not reach the question of whether or not there was an adequate allegation of deprivation of a federal right. (p.7,n.4) Its opinion rested on what it perceived as a failure to allege that the actions complained of were taken under the color and authority of D.C. law. But, as we have

seen from the paragraphs of the complaint, in general terms such allegations were made. It is apparent from the opinion below and the opinion which it affirmed that, in a confusing way, the case was dismissed, and that dismissal affirmed, not because the necessary allegations required by this Court for 1983 pleading were not made but rather because of two things: a) In addition to alleging that the actions complained of were taken under color and authority of the laws and regulations of the Superior Court, the plaintiffs also complained that the actions complained of, though taken under color and authority of the laws and regulations of the Superior Court, also violated D.C. law and such things as Rule 65 of the Superior Court rules; and b) the plaintiffs did not allege in the complaint the specific citation of the Rule used to evade the due process requirements of the

federal Constitution and the other federal rights it is alleged were violated.

Both the district court opinion and that of the court of appeals avoid, as if non-existent, the passages we cite above meeting the Gomez requirements. Instead the judges selected only those paragraphs and passages of paragraphs in which it was alleged that the actions complained of were also violative of D.C. law. Thus, in the case of paragraph I-44 where the complaint speaks of how the very color of the law and authority of the Superior Court was used to evade other parts of the local law (i.e. Rule 65, identical to federal 65 in all pertinent respects) the judges chose instead preceding paragraph I-43 where the D.C. law it was charged was evaded by the use of the color and authority of other D.C. law is alleged to have been violated. In other words, under the theory upon which this case was dismissed and dismiss-

al affirmed, a party may not allege that actions violated both federal rights and local law, even where the procedure alleged to be violative of federal rights is also violative of other local or state law. It must be alleged that the only violation was of federal rights and that no state law can have been violated as well. Under this criterion it should be noted, Mr. Lugar should not have had this Court decide in his favor. For, he not only alleged, in addition to the violation of 42 U.S.C. 1983 by depriving him of due process in attaching his property without a hearing, he also alleged that the attachment violated Virginia law and did in fact some weeks later obtain a ruling that the attachment was not valid under Virginia law and would have to be released.

Thus, in the present case the lower courts, by "selective editing," see what they want to see and hear what they want

to hear and throw out petitioners' case, (which is quite evidently what they wished to do) not by interpreting the complaint in favor of the complainants and against the moving parties, but rather by selectively reading only that in the complaint which will favor the moving parties. It would seem that this undermines and overturns the decision of this Court in Gomez in that it says that it is not enough to plead that the actions complained of violated federal law and were under the color and authority of state law, it must also be the case that no allegations are made that in doing the acts complained of there was also a violation of state law and procedures other than those complained of as violating federal rights. In other words, any claim of wrongful attachment or seizure under state law, any claim that the attachment or seizure was in error under state law -- will have to be abandoned if

42 U.S.C. 1983 remedies are to be pursued. It is evident that neither this Court nor any any other court of record has ever imposed such a draconian choice before and, indeed, that the lower courts here contradict this Court's decision by adding this requirement.

At the same time this technique of getting rid of an unwanted complaint, (for such it surely is,) conflicts also with the holding of Conley v Gibson, supra that specific facts need not be set forth to support general allegations. In the oft quoted passage in Conley it is stated:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" [fn.: Rule 8(a) (2), 28 U.S.C.A.] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms attached to the Rules plainly

> demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.[fn. here states: See, e.g., Rule 12(e) (motion for a more definite statement); Rule 12(f)(motion to strike portions of the pleading); Rule 12(c) (motion for judgment on the pleadings); Rule 16(pre-trial procedure and formulation of issues); Rules 26-37(depositions and discovery); Rule 56(motion for summary judgment);Rule 15(Right to amend).] Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately sets forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. Maty v. Grasselli Chemical Co., 303 U.S. 197, 58 S.Ct. 507, 82 L.Ed.745 Id. at 47-8

It is clear that to make the failure to name the specific Rule 12-I(b) of the Superior Court in the complaint fatal is precisely such a misstep as is barred directly by Conley. The procedures of the

Federal Rules referred to would easily enable the addition to the complaint of the specific Superior Court Rule 12-I(b) as it then existed (not in the federal rules) which was used to effect the wrongs complained of in violation of Rule 65 with its established constitutional safeguards.

Further, under the "notice pleading" standard defendants already knew that a Superior Court rule and procedure was involved. As the affidavit of Jeffrey Wagner, Sun attorney-defendant, shows, (as filed in the related case also then before the district court judge,) Roseman of J/D explained this procedure for getting around the stifling and constitutional requirements of a hearing under Rule 65 to Wagner who in turn checked them out with

Forester, as the expert on local rules.[4] Attorneys are held to know procedures of a court which they successfully use. The holdings below are designed with great ingenuity to evade the rule of Conley and, therefore, conflict with it in this regard, as if attorneys could not know the court procedures they do, in fact, use. Further, they vary from the accepted practice that has been followed under Conley since it was decided 35 years ago.

In addition to the conflicts with Conley and Gomez, and the variance from the usual and accepted practice under them, there is

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[4]A- . Courts have a right to take notice of their own records. Bienville Water Supply Co. v Mobile 186 US 212. Including cases submitted before the court at the same time. West Ohio Gas Co. v Public Utilities Com. 294 US 63. Here it is clear that the district court did not want the record which was building in the related Petroleum Marketing Practices Act (PMPA) case of Hoai v Sun then before him to be noticed. Only by consciously "not seeing" what was revealed in that companion case and preventing such a record from building in this case could he successfully bury the plaintiffs' case here.

a further such conflict and variance here. For, to deliberately ignore that which is in favor of the complainants and parties moved against under Rule 12(b)(6) and to "selectively see" the complaint to favor the movants when not to do so and to instead read and emphasize what the complainants have stated in the complaint which would pass Rule 12(b)(6) muster is not only to interpret the complaint in favor of the moving party and the complainants in violation of the most basic established practice under the federal rules, it is positively to distort that requirement. There is no more basic tenet laid down by this Court than that the allegations of the complaint must be taken as true for purposes of a Rule 12 motion. Walker Process Equip. v Food Machine & Chem. Corp. (1965) 382 US 172, 86 SCt 347, 15 Led2d 247. To only select what will enable an erroneous grant of dismissal

from a complaint and ignore other allegations in the same complaint that would bar dismissal is scarcely to take the allegations of the complaint as true or interpret in favor of the party moved against in line with universal practice. Yet the ironclad rule of this Court is that on a motion to dismiss the allegations of the complaint must be taken in favor of the complainants. Scheuer v Rhodes, supra. The decisions here are in conflict with that famous decision. They conflict also with this Court's decision in Hospital Bldg. Co. v Trustees of Rex Hospital that complaints must be fairly read. Here the lower courts have set out from the outset to read the complaint unfairly to the plaintiffs if they could.

In line with this selective technique there is a further conflict with Conley here that argues for the grant of the writ which also varies greatly from established

practice. In Conley (at 45-6) it was held that this Court follows:

> the accepted rule that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that which would entitle him to relief. (citations omitted).

In all other circuits the plain language of this mandate has been taken to mean that the burden is upon the moving party to show that no facts can be proven to show that the general allegations of the complaint can be supported. Here below we see the unseemly spectacle of judges and moving parties stumbling over each other to not take notice of Rule 12-I(b) of the Superior Court as it existed at the time complained of, a fact of which courts are generally required to take notice -- the existence of a statute or regulation of a court.

The court of appeals here has created conflict with Conley and the regular practice which has developed under this justly

famous passage by reversing the burden. Here they say the defendants had no duty to show this Rule 12-I(b) was not there. Instead these opinions say, unless the rule was cited by its specific alphanumeric designation in the complaint, even if there were general allegations that the rules and practices of the court were invoked, is is as if the Rule did not exist. This is a direct challenge to the authority of this Court and the invariable practice in all other circuits under its famous holding in Conley. It is a conflict and variance that requires the writ be issued so that it may be corrected.

In connection with challenging the principles established by this Court in the cases cited above, the court of appeals in this case also decided to reverse the applicable precedent of this Court and vary from the established practice in the area of amendment under Rule 15, one of the

corrective areas of the federal rules cited in the passage from Conley above. The court of appeals went out of its way to assure that no amendment would be allowed by the district court. An amendment had been proffered by the plaintiffs solely in connection with their Rule 60(b) motion for reconsideration after they were caught by surprise by the unexpected dismissal. It remains pending to this day and has never been decided upon by the district court.[5] But the court of appeals went out of its way to make it clear that an amendment should not be granted, thus purposely killing the petitioners' Rule

[5]The district court sat on the plaintiff Hoai's motion for summary judgment on liability in the companion PMPA case before the same judge for a year and a half before deciding it. After plaintiff Hoai's limited (by the court, before going to the jury) damages verdict in that case Sun filed a Rule 59 motion which has now been outstanding since October. This litigation of Hoai has demonstrated graphically the famous observation of Mr. Justice Frankfurter that justice can be denied effectively by delay.

60(b) motion in such a manner as to prevent there from ever being an actual ruling on it which could be appealed. Ignoring the fact that the amendment had only been proffered, as is the standard practice, in connection with an undecided Rule 60(b) motion, the court of appeals made up its own judicial doctrine, based upon its own earlier holding in another case, in direct contravention of the landmark decision of this Court in Foman v. Davis, supra. In this case the appellate judge created a rule that inadequate complaints will be allowed to be amended only "in certain special circumstances", rather the reversal of, and a direct challenge to, the holdings of this Court and the mandate of the federal rules. It was done in this way: Purporting to make the decision only at the appellate level, the judge nonetheless sent a clear signal to the district court judge that no amendment

should be allowed, which the latter has heeded by simply refusing to ever act on the Rule 60(b) motion. This technique is a variance from the established practice in which the district court is to be allowed to decide whether it is inclined to grant the Rule 60(b) motion or not and then that inclination is communicated to the Court of Appeals. Here the district court simply refused to decide anything until it was certain of the direction the court of appeals wanted to go in and then, seeing that was a negative direction for the petitioners, decided never to decide. This technique challenges the holding of this Court in Foman in a de facto manner that is a classic tactic of justice delayed as a denial of justice -- in this case a delay of forever. This ought to be corrected by granting the writ and making it clear that such de facto subterfuges to challenge the holding of Foman will not be

allowed. Here there was no examination of whether there had been any prejudice to a defendant that would result from granting an amendment. Absolutely nothing had happened in the case and there had been no responsive pleading, if one accepts the pretense of the court of appeals that only the pleading itself was involved.

That there had been no action in the case, of course, is because petitioners, when the dismissal motions were filed, moved the district court to stay matters in this case until <u>after</u> the then pending summary judgment motion had been decided. (It took a year and a half). The stay motions also were treated with the technique of deciding never to decide them. The district court sat on them, neither denying nor granting them during the many months in which all parties treated matters as in abeyance until they were decided and no party did anything. Then,

instead of waiting until after the decision in the PMPA case and allowing the impact of that decision to be incorporated in this case as requested, which surely would have included amending the complaint,[6] the district court decided in favor of the plaintiff Hoai on the PMPA summary judgment (a result dictated by the intervening reversal of the district court by the appeals court and its resulting opinion[7]) and, on the same day, dismissed the civil rights case complaint so as to no only prevent any correction of the complaint's perceived errors but, just to make sure, in the process issued a show cause to Hoai's counsel and petitioner

[6]Plaintiffs-petitioners saw flaws in the complaint soon after filing it but, rather than amending immediately and using up their single amendment of right decided to wait until the motions to stay were decided and then seek to amend to strengthen and absorb the impact of the PMPA decision in one amendment. This would have served judicial economy and prejudiced noone.

[7]See Hoai v Sun Refining & Marketing Co., Inc. supra.

John D. Hemenway as to why they should not be sanctioned. This crude attempt to control the petitioners and "put them in their place" was candidly revealed at the conference on the Rule 60(b) motion by the remark, in response to Sunoco's demands that the counsel for Hoai be a) subject to millions of dollars in sanctions and b) punished for answering a reporter's questions, that Hoai's litigation generally would be treated like General Powell had just said he would treat the Iraqi army, which is to say it would be surrounded and killed. Such tactics present questions challenging the normal processes of the courts and cases long since decided in segregationist days and should lead to a grant of the petition and appropriate correction. While this show cause has never been acted upon and the sanctions motions have never been acted upon but have instead been allowed to hang over the head

of the counsel for plaintiff Hoai like the sword of Damocles as a control, so that no decision is there for an appeal to be taken from, the use of the show cause as a chilling and intimidating weapon against civil rights litigants in this fashion is something that this Court needs to examine and set some standards on. The misuse of Rule 11 for this purpose has not been examined and should be. This case, with an Asian-American up against the civil rights establishment that has been reluctant to include his particular minority despite the dreams of Dr. King, presents an opportunity to examine this tactic that is necessary to delineating for the future the line between sanctions as an appropriate tool to expedite proceedings and sanctions as a device for denying fair and equal treatment.

A further issue here was the manner in which the appeals court completely

diverted attention from and refused to consider certain key issues such as the above even though they were briefed. Chief among these, in addition to the misuse of Rule 11,[8] was the matter of the massive amount of material outside the pleadings presented with the dismissal motions and not excluded by the district court. In particular the dismissal motion of the J/D defendants contained hundreds of pages of supporting documents, including an affidavit by defendant-attorney Roseman with some 12 exhibits attached. Not only were these materials outside the complaint not excluded, they were relied upon the district court in the opinion in this case, which was issued simultaneously with the opinion in the PMPA case granting Hoai summary judgment for liability in

[8]It is, of course, obviously a good thing that Rule 11 was not available to the segregationist judges of the Deep South in their heyday, else the civil rights of today never would have been developed.

that companion case. A-30-31

Under the mandatory terms of Rule 12(b) as practiced without exception in most federal courts, and certainly in other circuits, this converted the motion for dismissal into one for summary judgment. Yet petitioners were given absolutely no opportunity to respond to this conversion and counter this amount of material outside the pleadings used against them. Petitioners briefed this issue at some length in their appeals briefs and the issue was completely avoided and evaded by the appellate panel at oral argument. The oral argument reveals that in order to distract from this crucial issue, the judge leading the appellate panel brought into the proceeding a "red herring" in the form of an unbriefed issue that was apparent not real, the question of whether or not Rule 60(b) motions toll the appeal, a question long since decided in the nega-

tive and a situation long since dealt with in the D.C. Circuit with an appropriate responsive procedure. Petitioners were given the misleading impression that the case would be remanded, which would have meant a consideration of their Rule 60(b) motion and amendment if they would withdraw the appeal, which they agreed to do. The appeal was not withdrawn, however. This was a maneuver to prevent petitioners from presenting their case.

In addition the petitioners were refused the right to file a reply brief in reply to each of the two oppositions which were filed against them in the court of appeals. Reading FRAP 28(c) according to its plain language, which specifies, in the singular, that there may be a brief filed in reply to the brief of the appellee to mean, as one normally would, that where several appellees each file a brief, one may file a reply to each, petitioners

were startled to find themselves told that they could only have one reply brief filed to the two, greatly differing, opposing briefs filed by two separate sets of appellees. Thinking it was like the practice in this Court, petitioners filed to have their second reply brief filed supplementally, pointing out the plain language of the rule and the practicalities of the matter. To their surprise this was rejected without comment as was a supplemental appendix. Given the evasion and diversionary tactics by the courts below that characterized this case this would seem to be one more attempt to avoid the merits of the case and the admonition of the federal rules that pleadings must be construed so as to do substantial justice. At every turn, in both lower courts, the effort was made to see that the merits of the case were not fully considered. The elimination of multiple reply briefs to

reply to multiple and differing appellee briefs is a serious blow. Under this rule, regardless of the number of appellee briefs, if there were ten or more, there would still be allowed only a single reply brief to all ten. The writ should be granted to straighten this out.

To get to the merits of the Lugar contentions, which, while the existence of Rule 12-I(b) and the right to amend were being avoided, were discussed in the opinion below in the court of appeals, albeit under the crippling conditions imposed by the diversions addressed. The essence of the appellate opinion (A-16) is that the present situation does not present the requisite "'joint activity' with the state" under the Lugar rule to meet the test. It will be noted, however, that all of the cases cited by the judge (A-16-17) are of the type of Dennis v Sparks (1980) 449 US 24 where the fact pattern

was of use of the court procedures in a corrupt fashion without the procedures themselves, as such and on their face, having any constitutional invalidity or being oppressive or contrary to federal rights. In Dennis, for example, the allegations were that the court's regular procedures, which had no flaws in and of themselves, were employed, but the judge was bribed. Thus it can be seen that the entire holding of the courts below was only enabled by the game of "burial" of Rule 12-I(b) of the Superior Court as then constituted and the merits of Hoai's complaint against its invalidity. In order to reach the pre-desired result, just as in the segregationist days, the courts had to completely distort major constitutional safeguards surrounding civil rights litigation as they were developed over the last 35 years in the cases above. Only by doing that could they reach the predesired

result of burying Mr. Hoai's civil rights case and "putting him in his place" under the PMPA case.[9] Thus the necessity to conflict with the rules of this Court and the usual and accepted practices thereunder as set out above. Without being able to bury Rule 12-I(b) out of sight, it would have to be faced in all its pristine unconstitutionality and Mr. Hoai and his case could not have been moved to the back

[9]It may well be, of course, that Judge Edwards, who wrote the appellate opinion in both cases, anticipated that Hoai would obtain his full recovery from Sunoco in the PMPA case and the matter would then disappear from the calendar. If so, Judge Oberdorfer submarined that bit of management by limiting Hoai's damages so severely before they went to the jury, on the theory that Sunoco could "legally" terminate his franchise over seven months after they had illegally terminated it and given it to Vo, that they are minimal. Obviously the limitations will be appealed by Hoai. But that can only be after the resolution of Sun's post trial motions, the first of which has now been outstanding since October. It must be remembered that the summary judgment motion in the PMPA case took a year and a half to decide. More opportunity for denial by delay here.

of the freedom and justice train. The assertion that Lugar does not apply (A-17) because limited to the "the particular context of prejudgment attachment" can only be asserted with any pretense of accuracy if one hides the fact that Rule 12-I(b) (before changed at the beginning of 1991) provided a procedure by which unscrupulous attorneys and their clients could far surpass the mere attachment enabled by the defective Virginia procedures which were struck down in Lugar.

While this maneuvering and diversion to enable this avoidance of the application of Lugar was going on, however, on June 3, 1991 this Court handed down its decision in Edmonson v Leesville Concrete Co. (1991) 500 US ___, 114 Led2d 660. That decision greatly expanded the explanation of the Lugar criteria, codifying them, so to speak, and made it clear that they would apply in this case were Rule 12-I(b)

to be considered and the other procedures alleged and discussed in this petition. The appellate judge relegated it to a footnote (A-19) wherein he repeated the mischaracterization of this fact situation as akin to that in the Dennis v Sparks type of case. Pointing out that the crucial factor in Edmonson was that the peremptory jury challenges "'could not exist' without the direct and indispensable participation of the state, and, more particularly, of the judge" as found by this Court the appeals court refused to see the nose of Rule 12-I(b) and the judge-in-chambers participation of Judge Eilperin in front of its face and said that such assistance was, by contrast "never alleged" in this case. This, however, would seem to prove petitioner's point. There is no procedure in the law more open to abuse of the constitutional safeguards upon which we depend than that by which

private parties may, in effect, enter a judgment signed by a judge. The judge in Edmonson was not alleged to have participated in any conspiracy or have any improper motive. Like Judge Eilperin of the Superior Court here, he simply followed a procedure. There is no difference, under the decision, between a judge allowing the exercise of peremptory jury challenges, with which attorneys then exclude all members of one race, and Judge Eilperin here allowing the entry of a consent order for the purpose of making a deal with a known hoodlum who had threatened Mr. Hoai with murder to give him the franchise which was legitimately Mr. Hoai's.

Surely there can be no case more important than this to warrant an exercise of this Court's certiorari jurisdiction.

Respectfully submitted.

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States mail, first class, postage prepaid, true and accurate copies, 3 each, of the foregoing petition this 18th day of February, 1992, to each of the following counsel of record below:

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91-1341

SUPREME COURT, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

Appendix 1 to
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARGUED MAY 13, 1991 DECIDED JUNE 11, 1991

NO. 90-7170

THANH VON HOAI, et al.,
APPELLANTS

v.

THANH VAN VO, et al.,
APPELLEES

Appeal from the United States District Court for the District of Columbia
(Civil Action No. 89-2397)

Laurence A. Elgin, with whom John D. Hemenway was on the brief, for appellants.

J. Gordon Forester, Jr., with whom Stephen H. Abraham was on the brief, for appellees Sun Refining and Marketing Co., J. Gordon Forester, Jr., Geoffrey Wagner and Joseph P. Zulli.

Brian P. Maschler, of the bar of the Supreme Court of California, pro hac vice, by special leave of the court, with whom Francis X. Markey was on the brief, for appellees Jones, Day, Reavis & Pogue, Millard F. Ottman, Jr., and David C. Roseman.

Robert J. Pleshaw entered an appearance for appellee Thanh Van Vo.

Before EDWARDS, BUCKLEY AND RANDOLPH, Circuit Judges.

Opinion for the Court, filed by Circuit Judge EDWARDS.

EDWARDS, Circuit Judge: This case arises from the claim of the appellants, Thanh Vong Hoai, David Hemenway and John Hemenway, that they were deprived of their civil rights in violation of 42 U.S.C. § 1983 (1988) and 42 U.S.C. § 1985 (1988) during the course of prior litigation involving Mr. Hoai's right to operate a gas station franchise. Named as defendants in the appellants' suit are Thanh Van Vo, competing claimant to the franchise, Sun Refining and Marketing Company ("Sunoco"), owner of the franchise, and attorneys representing them, including the law firm of Jones, Day, Reavis and Pogue ("Jones, Day") (collectively, the "appellees"). the District Court dismissed the appellants' case for failure to state a claim upon which relief can be granted. see Hoai v. Vo, Civ. Action No. 89-2397

(D.D.C. Oct. 2, 1990), reprinted in Joint Appendix ("J.A.") 778.

We agree with the District Court that the appellants' civil rights claim is fatally flawed. Specifically, the appellants' complaint alleges no facts to support a finding that the appellees, all private parties, acted "under color of" law for purposes of section 1983. Nor do the appellants allege the existence of a conspiracy motivated by a class-based, invidiously discriminatory animus, as required by section 1985(3). Accordingly, we affirm the District Court dismissal of the action.

I. BACKGROUND

This cases arises from a long-standing, and thoroughly litigated, dispute between Hoai and Vo over the right to a Sunoco gas station franchise located in Washington, D.C. The merits of that dispute are not now before the court. Rather, the appel-

lants' civil rights claim focuses on the conduct of the appellees during previous litigation involving the franchise. The course of the relevant legal proceedings is therefore charted briefly below.

In August 1986, Vo initiated legal action in connection with the franchise by filing suit against Hoai and Sunoco in the Superior Court of the District of Columbia ("D.C. or "District"). Also named as defendants were John Hemenway, who had been acting as Hoai's attorney, and his son, David Hemenway, who had been acting as Hoai's agent. Vo was represented before the D.C. Superior Court by attorneys from Jones, Day.

In essence, Vo alleged that Hoai first transferred the Sunoco Franchise to him and then, with the aid of the Hemenways, wrongfully evicted him from the gas station. See Amended Verified Complaint, reprinted in J.A. 138. In response, Hoai

claimed that he was the rightful owner of the franchise, and that he had signed his interest over to Vo only under duress, including threats of violence. See Answer, Counter-Claim and Third Party Claims, reprinted in J.A. 164. After holding an evidentiary hearing, the Superior Court granted Vo's motion for a Temporary Restraining Order ("TRO") reinstating Vo in the gas station, removing Hoai from the station, and directing Sunoco to continue supplying the station with gasoline. See Vo v. Hoai, Civ. Action No. 7075-86 (D.C. Sup. Ct. Aug. 29, 1986), reprinted in J.A. 82.

On September 8, 1986, the Superior Court accepted a voluntary consent agreement between Vo and Sunoco, pursuant to which the terms of the TRO as to Vo and Sunoco were extended for up to an additional seven months, or until there was a prior resolution of the dispute between Vo and Hoai.

See Vo. v. Hoai, Civ. Action No. 7075-86 (D.C. Sup. Ct. Sept. 8, 1986) reprinted in J.A. 85. The consent order was negotiated by Vo's attorneys and by attorneys representing Sunoco. Hoai and his counsel were not notified of the consent agreement until after it was accepted by the court.

Hoai appealed the Superior Court's acceptance of the consent agreement; however, while this appeal was still pending, the consent agreement expired on March 31, 1987, and the D.C. Court of Appeals subsequently ruled the appeal moot. The case was then remanded to the Superior Court for a trial on the merits of Vo's claim against Hoai. See Hoai v. Vo, No. 86-1323 (D.C. Mar. 4, 1988), reprinted in J.A. 162. The case before the Superior Court, which was stayed on the motion of Hoai

while he pursued several related suits, is still pending.[1]

In August 1989, Hoai and the Hemenways filed the civil rights action underlying this appeal. At the heart of the appellants' claim are alleged abuses of the D.C. Superior Court process by Vo, Sunoco and their respective attorneys. In essence, the appellants allege that they were deprived of their civil rights in

[1]Among the avenues of litigation pursued by Hoai was a RICO suit filed against Vo and others in the United States District Court for the Eastern District of Virginia. That court dismissed Hoai's action in July 1987. See Hoai v. Vo, Civ. Action No. 87-0294 (E.D. Va. July 2, 1987) reprinted in J.A. 3380. Hoai also sued Sunoco in the United States District Court for the District of Columbia, alleging that the termination of his franchise violated the Federal Petroleum Marketing Practices Act ("PMPA"). After this court reversed a District Court decision to stay the action pending resolution of the Superior Court proceedings, see Hoai v. Sun Refining & Marketing Co., 866 F.2d 1515 (D.C. Cir. 1989), the District Court granted Hoai's motion for summary judgment as to liability. See Hoai v. Sun Refining & Marketing Co., Civ. Action No. 87-2456 (D.D.C. Oct. 1, 1990). The damages portion of the PMPA action is now pending.

violation of sections 1983 and 1985 when the appellees lied to the court in order to obtain the initial TRO and then impermissibly excluded Hoai and his attorney from proceedings resulting in an extension of that TRO. See complaint, reprinted in J.A. 1.

On October 2, 1990, the District Court dismissed the action, holding that the appellants had failed to allege facts sufficient to support either a finding that the appellees acted under color of law for purposes of section 1983, or a finding that they acted with a class-based invidious discriminatory animus as required by section 1984(3). See Hoai, mem. op. at 3-7, reprinted in J.A. 780-84. In response to outstanding motions for sanctions filed by appellants to show cause why sanctions should not be imposed. See id. at 7-8, reprinted in J.A. 784-85.

On November 1, 1990, the appellants filed with the District Court both notice of appeal of the October 2 order and, pursuant to rule 60(b) of the federal rules of civil procedure, a motion for reconsideration and correction of the order. See rule 60(b) motion of plaintiffs, reprinted in J.A. 981. On December 28, 1990, two months after the notice of appeal had been filed, the appellants moved to amend their complaint, in part by adding several new causes of action. See plaintiffs' motion to amend, Hoai, Civ. Action No. 89-2397 (filed Dec. 28, 1990). The District Court heard argument on the appellants' motion, as well as on the question of sanctions, on February 1, 1991. No rulings had issued as of May 13, 1991, the date of oral argument in this appeal.

II. ANALYSIS

A. Appellate review

We begin by addressing the question, raised for the first time at oral argument, whether the rule 60(b) motion for reconsideration pending before the district court bars appellate review of the order dismissing the appellants' action. we find that it does not. It is true that some post-trial motions, including a timely motion to amend or alter a judgment under Rule 59(e),[2] render ineffective any notice of appeal filed before their disposition. See Fed.R. App. P. 4(a)(4); Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). A Rule 60(b) motion for relief from judgment is not, however, among the post-trial motions that operate

[2]Fed. R. Civ. P. 59(e).

to preclude appellate review during their pendency. See Fed. R. App. P. 4(a)(4).[3]

Therefore, the pendency of the appellants' rule 60(b) motion in no way affects our jurisdiction over this case. Rather, when both a Rule 60(b) motion and an appeal are pending simultaneously, appellate review may continue uninterrupted. At the same time, the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be

[3]Nor may we bring the appellants' motion within the ambit of Rule 4(a)(4) of the Federal Rules of Appellate Procedure by construing it as one to amend or alter a judgment under Rule 59(e). A post-judgment motion challenging the correctness of a trial court judgment may be treated as a Rule 59(e) motion only when it is filed within the time limits prescribed by Rule 59(e). See Moy v. Howard Univ., 843 F.2d 1504, 1505-06 (D.C. Cir. 1988). Because the Rule 60(b) motion in this case was not filed within 10 days of judgment, we are obliged to treat the motion pursuant to the dictates of Rule 60(b), and Rule 4(a)(4)'s limit on appellate review is inapplicable.

granted. See Reuber v. United States, 750 F.2d 1039, 1051 n.16 (D.C. Cir. 1984) (as amended Jan. 23, 1985); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 280 n. 22 (D.C. Cir. 1971) cert. denied., 406 u.s. 950 (1972). Here, the District Court has not indicated any willingness to grant the appellants' motion, and remand is thus unwarranted.

Accordingly, we reach the merits of the case before us. Our review is, of course, limited to the District Court dismissal order of October 2, 1990, the judgment from which appeal was taken on November 1, 1990. See notice of appeal, Hoai, Civ. Action No. 89-297 (filed Nov. 1, 1990). The appellants' motion to amend, filed after issuance of the judgment and notice of appeal, is not before this court.

B. Section 1983

Count I of the appellants' complaint alleges a violation of section 1983, which holds liable

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected [another person] to the deprivation of any rights, privilges, or immunities secured by the Constitution and laws ...

42 U.S.C § 1983. to state a claim under section 1983, a plaintiff must allege both (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the defendant acted "under color of" the law of a state, territory or the District of Columbia. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). We agree with the District Court that the second part of this standard is not satisfied by the factual

allegations of the appellants in this case.[4]

The essence of the appellants' complaint is that Vo, Sunoco and their lawyers wrongfully deprived Hoai of his interest in the gas station franchise "under color and authority" of the District of Columbia Superior Court. See complaint at para. 33, reprinted in J.A. 12. The factual picture painted by the complaint is one in which the appellees lied to the court and advanced an "erroneous and illegal theory of law" in order to obtain the original TRO, and then impermissibly extended the TRO by consent agreement without first notifying Hoai and his attorney. See id. at paras. 32-33, 27, reprinted in J.A. 11-12, 9. The complaint asserts that the Superior Court, an "unwitting" party to the

[4]Because we are in agreement with the District Court on this point, we do not reach the appellees' alternative argument that the appellants' complaint inadequately alleges deprivation of a federal right.

actions complained of, failed to exercise any "independent judgment" and thereby granted the TRO and accepted the consent agreement through "ineptitude and error." See id. at paras. 43, 32, reprinted in J.A. 15, 11. In other words, what is alleged is an abuse of the D.C. court system by private litigants and their attorneys. See id. at paras. 27, 45, reprinted in J.A. 9, 17 (alleging violations of local law and rules).

This allegation is insufficient to support a finding of action under color of law for purposes of section 1983. Private parties, like appellees here, may be deemed to have acted under color of law in two circumstances: when they conspire with state officials, and when they willfully engage in joint activity with a state or its agents. See Adickes, 398 U.S. at 152 (quoting United States v. Price, 383 U.S. 787, 794 (1966)); see also

Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 n.21 (1982). No conspiracy with local officials is alleged in this case. Therefore, section 1983 liability turns on whether the appellants' complaint can support a finding of "joint activity" by the appellees and the District of Columbia or its agents.[5] We find that it cannot.

It is well established that mere recourse to state or local court procedures does not by itself constitute "joint activity" with the state sufficient to subject a private party to liability under section 1983. See, e.g., Dennis v. Sparks, 449 U.S. 24, 28 (1980); Crabtree

[5]For purposes of this analysis the attorney appellees stand on the same legal footing as do Vo and Sunoco. An attorney does not act under color of law in her or his capacity as representative of a client in court. See Polk County v. Dodson, 454 U.S. 312, 318 (1981); McCord v. Bailey, 636 F.2d 606, 613 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981). Therefore, the attorneys in this case are properly treated as private parties, and may be held liable under section 1983 only if they have engaged in "joint activity" with the District of Columbia.

v. Muchmore, 904 F.2d 1475, 1476 (10th Cir. 1990); Jones v.Poindexter, 903 F.2d 1006, 1010-11 (4th Cir. 1990); Tunstall v. Office of Judicial Support, 820 F.2d 631,634 (3d Cir. 1987). Lugar v. Edmondson Oil, upon which the appellants place sole reliance, in no way undermines this principle. Lugar does, it is true, hold that private parties may incur section 1983 liability when they use a procedurally defective state process for prejudgment attachment of property, on the theory that they "jointly participate" with the state officials who actually seize the property. See 457 U.S. at 941-42. At the same time, however, Lugar explicitly limits its analysis to "the particular context of prejudgment attachment," and cautions that "we do not hold today that a private party's mere invocation of state legal procedures constitutes joint participation or conspiracy with state officials satis-

fying the section 1983 requirement of action under color of law." see id. at 939 n.21 (internal quotation marks and citations omitted).

Rather, the "joint activity" theory of section 1983 liability continues to require, at a minimum, some overt and significant state participation in the challenged action. See id. at 927; see also Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989) cert. denied, 110 S. Ct. 865 (1990) ("joint action ... requires a substantial degree of cooperative action."); Kolinske v. Lubbers, 712 F.2d 471, 479 (D.C. Cir. 1983) (Lugar standard not satisfied absent direct governmental involvement in adoption of or adherence to private agreement). The fatal flaw in the complaint before us today is its failure to allege any such direct or meaningful state participation. Indeed, the action by the state or its agents, characterizing

the D.C. Superior Court judge as an "unwitting" actor who exercises no independent judgment on the part of the District.[6]

Nor does the complaint identify any District rule or custom that might have facilitated the private wrongs alleged. To the contrary, the complaint both implicitly and explicitly alleges that the appel-

[6]The foregoing analysis is unaffected by the Supreme Court's decision in Edmonson v. Leesville Concrete Co., No. 89-7743 (June 3, 1991), rendered after oral argument in this case. Edmonson holds that the use of peremptory challenges by private litigants in civil cases constitutes "state action" subject to constitutional nondiscrimination requirements. At the same time, Edmonson reaffirms the basic principle that private use of state legal procedures does not rise to the level of state action absent "the overt, significant assistance of state officials." See id., slip op. at 7 (citation omitted). Because the peremptory challenge system "simply could not exist" without the direct and indispensable participation of the state and, more particularly, of the judge, the Court found the requisite "significant assistance" in Edmonson. Id. at 7-9. In the instant case, by contrast, such meaningful assistance is never alleged, and Edmonson is therefore inapplicable.

lees abused D.C. court procedures, by "ilegal and unconstitutional use of the color and authority of the [D.C.] laws ...." See Complaint at para. 27, reprinted in J.A. 9. When private parties violate state laws or rules, their actions can in no way be ascribed to the state, and they cannot be deemed to have acted "under color of" law for purposes of section 1983. See Lugar, 457 U.S. at 940.[7]

Conceding that the appellants' section 1983 claim is "unartfully" pleaded and seriously defective, counsel at argument directed our attention to Conley v. Gibson, 355 U.S. 41, 47-48 (1958), which emphasizes the generous "notice pleading"

[7]The appellants attempted to cure this particular deficiency both in their brief and at oral argument, suggesting that the appellees were aided by the operation of a procedurally defective D.C. court rule allowing ex parte consideration of the consent agreement. Because this allegation was not raised in the complaint, however, its introduction at this late date cannot save the appellants' action. We of course express no opinion as to the validity of any District of Columbia rule.

standard of the federal rules of civil procedure. We agree, of course, that "one misstep" by counsel will not always warrant dismissal of a complaint. See id. at 48. But a complete failure to allege facts that would support a finding of action under color of law is not a "misstep" within the meaning of Conley, and it affords valid grounds for dismissal of a section 1983 claim. we therefore affirm the district court judgment dismissing the appellants' claim under section 1983.

C. Section 1985

Count II of the appellants' complaint alleges a violation of section 1985(3) which prohibits conspiracies to interfere with the civil rights of individuals or classes of individuals. See 42 U.S.C. §

1985(3) (1988).[8] The scope of section 1985(3) is limited, however, by the condition that such conspiracies be "motivated by some class-based, invidiously discriminatory animus." See Hobson v. Wilson, 737 F2d. 1, 14 (D.C. Cir. 1984) cert. denied, 470 U.S. 1084 (1985). We agree with the District Court that the appellants' complaint fails to allege any facts tending to show the existence of the requisite class-based, discriminatory motivation.

The only discriminatory animus alleged in the appellants' complaint is targeted at a class of franchise holder; "there is an invidious discrimination against the legitimate holder of a franchise as a rep-

[8]In their complaint, the appellants do not specify the subsection of section 1985 upon which they rely. Like the District Court, however, we find that the complaint is properly construed as resting on section 1985(3), and could not possibly support a claim under either section 1985(1) or (2). See Hoai, mem. op. at 6 n.1, reprinted in J.A. 783.

resentative class ...." See Complaint at para. 49, reprinted in J.A. 20. But it is clear that the kind of class-based animus contemplated by section 1985(3) does not include discrimination against classes defined by economic status or activity. See United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 838-39 (1983); Hobson, 737 F.2d at 15. Indeed, counsel for the appellants conceded at argument that the appellants' allegations are insufficient to support a finding of conspiracy actionable under section 1985(3). Therefore, we affirm the District Court dismissal of the appellants' section 1985 claim.

D. Leave to Amend.

As noted above, the appellants' motion to amend their complaint, filed with the District Court only after entry of the judgment at issue and after the notice of appeal, is not now before this court. At

oral argument, however, counsel for the appellants suggested for the first time that the appellants are now entitled to amend their complaint to cure the deficiencies discussed herein. We disagree.

It is true that, in certain special circumstances, this court will allow amendment of inadequate complaints. See Martin v. D.C. Metro. Police Dep't, 812, F2d 1425, 1436-38, (D.C. Cir.), reh'g granted & opinion vacated in part, 817 F.2d 144 (D.C. Cir.), reh'g dismissed & opinion reinstated, 824 F.2d 1240 (D.C. Cir. 1987); Hobson, 737 F.2d at 30-31. None of those circumstances is present here. This is not a case in which a complaint's inadequacies are attributable to a new development or change in law, or to the inability of plaintiffs to gather relevant facts before discovery. Cf. id. Rather, the inadequacies we have identified result only from "unartful" drafting, as counsel

conceded, or, at bottom, from a simple absence of facts upon which more "artful" pleading might have been based. Under such circumstances, leave to amend is not warranted.

III. CONCLUSION

For the reasons set forth above, we find that the appellants have failed to allege facts sufficient to state a claim under either section 1983 or 1985(3). Accordingly, we affirm the District Court dismissal of the case.

So ordered.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,)
Plaintiffs,)
v.) C.A. NO. 89-2397
) LFO
THANH VAN VO, et al.,)
Defendants.)

[Stamp:] FILED
Oct 02, 1990
Clerk, U.S. District Court
District of Columbia

ORDER

For the reasons stated in the accompanying memorandum, it is this 1st day of October, 1990, hereby

ORDERED: that defendants' motions to dismiss should be, and hereby are GRANTED; and it is further

ORDERED: that plaintiffs' cause of action is DISMISSED; and it is further

ORDERED: that, on or about October 19, 1990 plaintiffs' attorneys, John D. Hemenway and Laurence A. Elgin, shall show cause, if any there be, why they should not be subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure.

/s/

Louis F. Oberdorfer
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,)
Plaintiffs,)
)
v.)C.A. NO. 89-2397-
)LFO
THANH VAN VO, et al.,)
Defendants.) [stamp]
FILED
OCT 02 1990
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MEMORANDUM

Plaintiffs in this action assert that defendants' conduct in connection with a prior litigation deprived plaintiffs of their civil rights in violation of 42 U.S.C. §§ 1983, 1985. For the reasons stated below, an accompanying order will grant defendants' motions to dismiss and dismiss plaintiffs' cause of action.

I.

Plaintiff Thanh Vong Hoai entered into a franchise agreement with defendant Sun Refining and Marketing Company ("Sunoco") in the spring of 1986. See Complaint at

para. 19. After a dispute arose between Hoai and defendant Thanh Van Vo as to the occupancy of the station, Vo initiated a law suit against Hoai in the District of Columbia Superior Court. See id. at paras. 25-27, 32. Vo was represented in the Superior Court action by defendants Millard F. Ottman, Jr., and David C. Roseman, members of defendant law firm Jones, Day, Reavis & Pogue. See id. at para. 14. In addition to Hoai, the other parties named as defendants in the Superior Court suit were: (1) plaintiff John Hemenway, who had been acting as Hoai's attorney; (2) plaintiff David Hemenway; and (3) defendant Sunoco, which was represented by defendants Geoffrey Wagner, Joseph Zulli, and J. Gordon Forrester, Jr. See Id. at pages 9, 16-18, 36; Affidavit of David C. Roseman, Exhibit A.

On August 29, 1986, the Superior Court issued a TRO that required Hoai and the

Hemenways to return possession of the station to Vo. See id. at page 33; Roseman aff., Exhibit A at 2. The TRO also required Sunoco to continue supplying Vo with petroleum products. See Roseman Aff., Exhibit A at 2. On September 8, 1986, the day before the TRO was to expire, Sunoco and Vo entered into a consent agreement by which Sunoco agreed to continue supplying Vo with petroleum products. See Complaint at paras. 38-41; Roseman Aff., Exhibit B at 2. The consent agreement, which specifically excluded other parties from its terms, was signed by a judge of the Superior Court. See Complaint at paras. 40-41; Roseman Aff., Exhibit B at 3.

II.

In this action, plaintiffs claim that, by obtaining the TRO and by entering into and executing the consent agreement, defendants violated plaintiffs' civil

rights under color of local law. See Complaint at paras. 42-46. Plaintiffs also claim that defendants engaged in an invidiously discriminatory conspiracy to violate plaintiffs' civil rights. See id. at pages 47-50. Plaintiffs seek damages of $30,900,000. Plaintiffs' complaint must be dismissed, however, as it fails to allege sufficient facts to support a finding that defendants acted under color of state law or that defendants acted with an invidious class-based animus.

A.

Count I of plaintiffs' complaint alleges a cause of action under 42 U.S.C. § 1983. Section 1983 provides a private right of action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, [another person] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...

42 U.S.C § 1983. To state a cause of action under § 1983, a plaintiff must make two showings: first, that the defendant deprived the plaintiff of rights secured by the "Constitution and laws" of the United States, see Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970); and second, that the defendant acted "under color of" the law of a state, territory, or the District of Columbia, see id. (citing Monroe v. Pape, 365 U.S. 167, 184 (1961). Plaintiffs' § 1983 claim must fail because the complaint does not allege any facts to support a finding that defendants acted "under color of" the laws of the District of Columbia.

Plaintiffs' complaint seems to suppose that defendants acted under color of District of Columbia law by using the District of Columbia Superior Court to obtain a TRO and to execute a consent agreement. See complaint at paras. 33-34, 42.

Resorting to a state's judicial system, however, neither cloaks private litigants with state authority nor renders their actions "under color of" state law. See Dahl v. Akin, 630 F. 2d 277, 281-82 (5th Cir. 1980), cert denied, 451 U.S. 908 (1981). Similarly, "a lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of § 1983." Polk County v. Dodson, 454 U.S. 312 (1981) (footnote omitted). Private litigants are not liable under § 1983 unless they use the state's judicial system in such a way that their conduct may fairly be attributable to the state. The Supreme Court has recognized that "[w]ithout a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interaction with the community surrounding them." See

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

Plaintiffs may prove that defendants were state actors in one of two ways. First, defendants may be held liable under § 1983 if they conspired with District of Columbia officials to deprive plaintiffs of federal rights. See Adickes, 398 U.S. at at 152. Plaintiffs' complaint, however, explicitly avoids alleging that defendants conspired with local officials. See complaint at para. 41. Second, defendants may be considered state actors if they acted "consciously pursuant to some law that [gave them] aid, comfort, or incentive." Adickes, 398 U.S. at 212 (Brennan, J., concurring); cf. Moose Lodge No 17 v. Irvis, 407 U.S. 163 (1972) (enjoining enforcement of a state rule requiring Moose Lodge to comply with its own bylaws insofar as they contained racially discriminatory provisions). The com-

plaint, however, specifically alleges that, in "holding out" the consent agreement as an extension of the TRO, defendants acted contrary to "the law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia." Id at para. 43. As this "holding out" was contary to local law, defendants conduct cannot be attributed to any action of the District of Columbia. This rationale was explained by the Supreme Court in Lugar v. Edmondson Oil:

> Count Two alleged that the deprivation of property resulted from respondents' ... "unlawful acts." By unlawful, petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the state. ... that respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or state decision. Count Two, therefore does not state

> a cause of action under § 1983 but challenges only private action.

Lugar, 457 U.S. at 940. Plaintiffs have not attacked the operation of any District of Columbia law or custom; rather, they have attacked defendants' alleged invalid invocation of District of Columbia law. As a result, they have not effectively alleged that defendants acted "under color of" District of Columbia law.

Section 1983 was designed to protect citizens from interference by states with federally protected rights. To that end, the statute reaches conduct by local government officials acting pursuant to their official authority as well as conduct by private persons acting pursuant to state law or custom. The statute does not, however, protect against purely private conduct that is not somehow sanctioned or aided by a state. Accordingly, as plaintiffs' Complaint fails to allege any facts to support a conclusion that defend-

ants acted "under color of" District of Columbia law, an accompanying Order will dismiss plaintiffs' claim under 42 U.S.C. § 1983.

B.

Count II of plaintiffs' Complaint states a cause of action under 42 U.S.C. § 1985 (3).[1] To establish a claim under 1985(3) a plaintiff must allege:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws ... and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in her person or property or deprived of any right or privilege of a citizen of the United States

Hobson v. Wilson, 737 F.2d 1, 14 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084 (1985); see also Martin v. Malhoyt, 830

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[1] The complaint does not specify under which subpart of § 1985 the action arises. The complaint contains no allegations, however, to support a cause of action under either § 1985(1) or § 1985(2).

F.2d 237, 258 (D.C. Cir. 1987). In addition, plaintiff must allege sufficient facts to prove that the conspiracy was "motivated by some class-based, invidiously discriminatory animus." Hobson, 737 F.2d at 14 (citing Griffin v. Breckenridge 403 U.S. 88 (1971)). Plaintiffs' conspiracy claim must fail because the complaint does not contain any facts to support a finding that defendants were motivated by a "class-based, invidiously discriminatory animus." Id.

Plaintiff Hoai is of Vietnamese ethnicity. See complaint at para. 21. The Complaint, however, neither alleges that defendants were motivated by racial or ethnic animus nor alleges any facts to support such a conclusion. The only class-based discrimination alleged in the complaint is premised upon plaintiffs' status as a franchisee. See complaint at para. 48 (defendants' actions "constituted

an invidious discrimination by which a rightful franchise holder is discriminated against in favor of an intruder ...") id. at para. 49 ("Under the effects of such a conspiracy there is an invidious discrimination against the legitimate holder of a franchise ... "). Courts have recently begun expanding the protection of § 1985 (3) beyond racial and ethnic groups. See, e.g., New York State Now v. Terry, 886 F.2d 1339, 1358-59 (2d Cir. 1989)(women); Conklin v. Lovely, 834 F.2d 543, 549 (6th Cir. 1987) (political views). The Supreme Court has specifically held, however, that § 1985(3) does not reach "conspiracies motivated by economic or commercial animus." United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 838 (1983). "Rightful franchise holder[s]," therefore, are not a protected class under § 1985(3). Accordingly, as plaintiffs' complaint does not allege any

facts to support a conclusion that defendants acted with "class-based, invidiously discriminatory animus," the accompanying Order will dismiss plaintiffs' claim under 42. U.S.C. § 1985.

III.

Defendants' Sunoco, Forrester, and Vo have moved for Rule 11 sanctions against plaintiffs' attorneys, John D. Hemenway and Laurence A. Elgin. Defendants assert that plaintiffs' complaint is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" and that it was filed to harass defendants and to increase the cost of litigation. See Fed. R. Civ. Proc. 11. Plaintiffs' attorneys have not yet responded to defendants' motion for sanctions. Accordingly, the accompanying Order will require plaintiffs' attorneys to show cause, if any there be,

why they should not be subject to Rule 11 sanctions.

Date: October 1, 1990

/s/ Louis F. Oberdorfer
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NO. 90-7170 SEPTEMBER TERM, 1991
CA 89-02397

Thanh Vong Hoai, et al.,
Appellant

[Stamp] UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED NOV 19 1991
CONSTANCE . DUPRE
CLERK

V.

Thanh Van Vo, et al.,

BEFORE: Edwards, Buckley and Randolph, Circuit Judges

O R D E R

Upon consideration of appellants' Petition for Rehearing, filed July 11, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /S/
Robert A. Bonner
Deputy Clerk

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NO. 90-7170 SEPTEMBER TERM, 1990
CA 89-2397

[Stamp] UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
FILED AUG 06 1991

CONSTANCE L. DUPRE
CLERK

Thanh Vong Hoai, et al.,

Appellant

v.

Thanh Van Vo, et al.,

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

O R D E R

Appellants' Suggestion for Rehearing En Banc has been circulated to the full Court. no member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

per curiam
FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /S/

Robert A. Bonner
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THANH VONG HOAI, et al., :
Appellants, :
v. : NO. 90-7170
THANH VAN VO, et al., :
Appellees. :

Monday, May 13, 1991
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 12:30 p.m.

BEFORE:
Judges Edwards, Buckley and Randolph

APPEARANCES:

Laurence A. Elgin, Esq., 8929 Sleaford Place, Annandale, Virginia 22003; on behalf of appellants

J. Gordon Forester, Jr., Esq., Greenstein, Delorme & Luchs, P.C., 1620 1 Street, N.W., Suite 900, Washington, D.C. 20036; on behalf of appellees, Sun Refining and Marketing Company

Brian P. Maschler, Esq., Jones, Day, Reavis & Pogue, 1450 G Street, N.W. Washington, D.C. 20005; on behalf of appellees

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P R O C E E D I N G S

THE CLERK: No. 9 -7170, Thanh Vong Hoai, et al., Appellant_ v. Thanh Van Vo, et al. Laurence A. Elgin, Esq., for Appellants; J. Gordon Forester, Jr., Esq., for Appellee, Sun Refining and Marketing Company; Brian P. Maschler, Esq., for Appellees, Jones, Day, Reavis & Pogue, et al.

THE COURT: You may proceed, counsel.

ORAL ARGUMENT OF LAURENCE A. ELGIN, ESQ.
ON BEHALF OF APPELLANTS

Mr. Elgin: Good morning, Your Honor. My name is Laurence Elgin. I am counsel for the appellants, Thanh Vong Hoai and David Hemenway. With me is Mr. John Hemenway, who, being a member of the bar, is representing himself in this proceeding

and acting as my co-counsel, and on his right is Mr. Hoai, my principal client.

I am reserving 5 minutes for rebuttal.

This case grows out of some events which, although not in this case, have been previously before the Court in a related matter. They originally grew out of events that happened in a proceeding by Mr. Vo, the defendant and appellee here, that was filed against Mr. Hoai, my principal client, and the Hemenways and the Sun Oil Company in the Superior Court of the District of Columbia, which in our contention was a violation of the settlement agreement that is on the record in that court, also in the parallel Petroleum Act case.

The events that precipitated the cause of action here arose after there was a TRO hearing in the Superior Court, in which for 10 days a valuable gasoline station franchise that was, by a standard written

franchise agreement, the franchise of Mr. Hoai, the Hemenways being his agents, Mr. Hemenway, Sr., being his attorney, and David Hemenway being an agent who is helping him in the station, were deprived of that station, and they fully expected and were promised a follow-on preliminary injunction hearing, but that did not happen. Instead, the events occurred which gave rise to the present cause of action.

Namely, the defendants here, in our contention, took advantage of Rule 12-I(b)of the Superior Court rules, which is a rule which is not found in the Federal Rules, although Superior Court rules are modeled indeed by statute on the Federal Rules, except as modified, and that rule at that time, it has since been modified, gave incredible latitude to what was called a judge in chambers. He might, in essence, do whatever he thought was appropriate ex parte.

In this case, what happened was the defendants, Vo and his law firm, the Jones, Day firm at that time was his law firm, made an agreement, without any notice to Mr. Hoai, with Sunoco for Sunoco, in essence, to switch sides, and they proceeded to another judge of the Superior Court other than the TRO judge, who had promised the preliminary injunction hearing, and succeeded in having entered in that court a consent order, in which they claimed to extend the TRO, but only as to themselves and not as to Mr. Hoai.

After this was a fait accompli, Mr. Hoai and his counsel were notified. Mr. Hoai appealed that decision, as appears in the record of the related case, and he raised the constitutional question, and so forth, of due process, but the District of Columbia Court of Appeals simply waited until they had judged the matter moot, a period of some 7 months being involved there,

that was the balance on the written franchise agreement.

Also, I would like to mention -- and we have now put this into the record, it is a matter of record in that court -- that we removed that case at that time to this Court, in order to get all of the causes of action in the court below. Judge Sporkin remanded it, on motion of both Sun and Vo, saying that there was not enough of a Federal question.

We then came over here and we filed a Petroleum Act case, which has previously been the subject of an intermediate appeal in this Court, in which the lower court, with the same judge below, was reversed, and in that case we are now back down below.

In the meantime, while cross-motions for summary judgments are pending in the Petroleum Act case, our statute of limitations on civil rights began to run, and

given what had happened in the Superior Court and the express wish of the judges over there not to be involved in any Federal questions, if they could avoid it, we brought our Federal civil rights actions over here. Okay. That is the background.

Getting to our point, our point basically is this, that on the same day that our long-standing -- it had been out for over a year -- motion for summary judgment in the Petroleum Act case was granted and, now that Sun was denied, our civil rights case was dismissed without further ado, and an opinion rendered on that, as well, and this was without any opportunity to amend, and we believe defies the mandate of the Supreme Court in Conley v. Gibson, in that while the complaint, we acknowledge, was inartful, we believe it can be amended to make it an adequate complaint, and we believe we had a right to amend,

under Foreman v. Davis, and that was simply ignored.

Not only that, but there were outstanding at that time two motions we had filed, one particularly directed to the 1983 aspects of our civil rights complaint, and the other addressed to it generally, asking that matters be stayed in the civil rights case until the resolution of the cross-motions for summary judgment in the Petroleum Act case, which we sought to point out inevitably, whatever decision was arrived at there would affect the situation in the related civil rights case.

QUESTION: Counsel, what's reversible error, as far as you're concerned?

MR. ELGIN: Well, the primary reversal error is this: We should have been given a chance to amend and make our case after the decision in the related case.

QUESTION: Is that motion still pending?

MR. ELGIN: Yes, he has never done anything, our stay motions are still sitting there and he has mentioned them in the last oral hearing, but does nothing, so --

QUESTION: Why is it before us ?

MR. ELGIN: I'm sorry ?

QUESTION: Why is that particular matter before us ?

MR. ELGIN: Well, because the dismissal seemed very final to us. Now, he didn't say anything, I admit, about whether it was amendable or not, but we moved to amend and there has been no results.

The other part of that, let me make this very clear, is that with the opinion dismissing our civil rights complaint was an order for us to show cause, particularly myself and Mr. Hemenway, as to why we shouldn't be sanctioned under Rule 11. We felt in the situation that this was simply an attempt to do that which all of the Rule 11 cases say the rule is not for,

that is to chill us. Even though we felt intimidated --

QUESTION: We don't have Rule 11 before us now. Okay ?

MR. ELGIN: I'm sorry ?

QUESTION: Rule 11 is not before us.

MR. ELGIN: There's no decision on the Rule 11, but it is part of the order.

QUESTION: All we have is a dismissal. We have a dismissal, right ?

MR. ELGIN: Yes, but it's part of the dismissal order and it certainly had an intimidating effect on us, particularly in light of the comments on the record a few weeks later in a hearing that we were going to be treated like the Iraqi army in this litigation, and --

QUESTION: Do we have jurisdiction over this appeal ?

MR. ELGIN: I'm sorry ?

QUESTION: Do we have jurisdiction over this appeal ?

MR. ELGIN: Well --

QUESTION: You filed a notice of appeal after you filed a Rule 16 motion.

MR. ELGIN: On the same day, actually.

QUESTION: The same day ?

MR. ELGIN: Yes.

QUESTION: Have you filed another notice of appeal since the 16(b) motion, since that time?

MR. ELGIN: No, because he's done nothing and, frankly, we are afraid of --

QUESTION: How do we have appellate jurisdiction in this case?

MR. ELGIN: Well, if the court holds that we have a right to amend and to seek amendment, I don't guess you do, but the argument on the other side has been that this is one of those cases -- and this is what we are afraid of -- this is one of those cases where, even if amended, we cannot make out a case.

Now, we felt that the opinion rendered below didn't give us guidance on that score. In other words, we felt we had to protect ourselves by noting an appeal at this time, because it was not clear and we feel that the lower court has not gone along with this Court's admonition in the Afshar case and made its line of reasoning completely discernible.

We felt very strongly that the other side was arguing and appeared to be accepted by the court that, no matter what we did to amend this complaint, we could not survive this dismissal, and, therefore, this dismissal was final.

Now, had the court articulated itself below on that point, this appeal would not have been necessary, but under the circumstances, we felt it neessary to protect ourselves by noting an appeal at this time.

Now, I would like to address, if Your Honors are interested -- if you are deciding on that question, perhaps I should not address it, but the --

QUESTION: Do I take it that you are, therefore, conceding that the complaint as presently drafted does not state a cause of action under the two statutes?

MR. ELGIN: I think it's inartful and weak and it is one of the complaints I am least proud of in my entire career. I do think it is amendable. I don't think it is a good complaint. Therefore --

QUESTION: And you are saying in all such circumstances where counsel is dismayed about the complaint, they have a right under the rules to amend it, to make it a better complaint ?

MR. ELGIN: No but I think that the Supreme Court has said in Conley v. Gibson that if you have a case on the merits, you should be allowed to amend and bring it

forward. Now, here we had the Petroleum Act case situation greatly affecting what went on in the civil rights case, in the sense that the deprivation of Federal rights involved was greatly related to what we felt was a decision we were going to obtain in the Petroleum Act case, but which the other side, of course, didn't feel we were going to obtain, and that is the --

QUESTION: I don't understand, why is the Petroleum Act case directly relevant to your failure to plead properly in the first --

MR. ELGIN: Well, it is not an excuse for what I consider the inartful nature of this complaint, in hindsight.

QUESTION: Well, I'm trying to understand. Now, you tell Judge Buckley that you pretty much concede that you can't prevail on the complaint. Now, what is it that you think is the rule of law with

respect to allowance of a motion to amend the complaint, once someone has exposed it as being totally inadequate, and it is not short of absolute, what is it? What's the rule of law?

MR. ELGIN: Well, I believe that, under certainly the -- for instance, let's take your honor's opinion in the Hobson case, particularly on a civil rights complaint, if a proper civil rights case can be made out and properly pleaded, there should be an opportunity to do so.

Now, here let me say that when I first noticed, which was --

QUESTION: There was some confusion in Hobson as to what the rule of law was against which you are raising a complaint, right ?

MR. ELGIN: I'm sorry ?

QUESTION: There was some confusion in Hobson as to what the substantive rules were, so it was not entirely clear what it

was that you had to say in a complaint, more than satisfy it, right ?

MR. ELGIN: Yes.

QUESTION: There is no such confusion here.

MR. ELGIN: Well, confusion --

QUESTION: The substantive rules were all there, you either pleaded or you didn't.

MR. ELGIN: Yes, but the confusion here is that if, in fact, as it turned out to be by the now present decision below in the Petroleum Act case, Vo was simply an intruder, a mere scrambler at the time and had no right, and then all kinds of issues are impacted by that.

In other words, if this station was the franchise of Hoai up until a point where it was improperly terminated by Sunoco and the actual complaint of, then it cannot have been the station of Vo, he cannot have had any color or authority of title

to it. Therefore, this becomes very much like the Lugar situation under 1983, where we have the use of what we feel is an unconstitutional rule in the Superior Court and some related rules and practices there, to affect not just an attachment before judgment, but an actual seizure of the man's property, without the hearing to which he was entitled and any notice, and this is a 1983 violation.

Further, after examining it further, rather than the --

QUESTION: And none of that was understood previously ?

MR. ELGIN: I'm sorry ?

QUESTION: None of that was understood previously ?

MR. ELGIN: Yes, and I think the 1983 case is made out in the present complaint, but I don't think it is very well made out. I mean the language is sloppy langu-

age, I will say that. I acknowledge that, sloppy language, but I think it's there.

Now, in terms of the 1985 case, I feel that we improperly left out a crucial allegation: We did not say this was because of racial prejudice, and we were trying to fit together the second sentence of our causes of 1985 II and 1985 III, in what we felt was an obstruction of justice based on, in effect, accepting what Vo represented, which was within the ethnic group private justice system that he represents, with his threats to break the legs of Hoai, and so forth, and buying off on that and saying, "Mr. Hoai, we don't care about you, we're going to let Mr. Vo and his colleague Thach and their pals take care of you with the particular brand of justice," which is that of a threat and violence, "and we're simply going to eliminate your access and we're going to take this property from you," speaking of

the deprivation of proeprty phase (sic) in the statute, "and you're not going to have the equal justice that all Americans outside of your ethnic group are entitled to," and this is the case that we feel we have and we feel that --

QUESTION: Let me switch you, before your time runs out. I understand what you're saying about what's missing. I think we all can see what's missing in T-85 (sic). In the 83, the heart of your claim, if you were allowed to plead it, is that the D.C. procedure is unconstitutional, as previously written?

MR. ELGIN: Yes, it was changed at the beginning of this year.

QUESTION: Tell me precisely what the constitutional claim is.

MR. ELGIN: I'm sorry?

QUESTION: Tell me precisely what your constitutional claim would be, if you could plead it?

MR. ELGIN: Well, that Hoai was entitled to due process in his rights under the Petroleum Act, principally. He was entitled to notice and he was entitled to a full hearing, a full preliminary injunction hearing, in accordance with the standard procedure, which is the same in the Superior Court as it is under Federal rules, and this is what he was promised by the judge below, and this is what he was deprived of by this maneuver.

QUESTION: Didn't he get full process on the Petroleum Act case ?

MR. ELGIN: I'm sorry ?

QUESTION: Didn't he get full process on the Petroleum Act case ?

MR. ELGIN: I'm not sure I understand the question.

QUESTION: Didn't he get a full hearing on the Petroleum Act case ?

MR. ELGIN: It hasn't gone to trial yet.

QUESTION: Hasn't he gotten summary judgment ?

MR. ELGIN: On liability only, I'm sorry, the damages are --

QUESTION: So, you're getting full process on that.

MR. ELGIN: But we've just had to file a mandamus, because they've taken away all the damages.

QUESTION: But you're in the middle of the process, that is constitutional right.

MR. ELGIN: Yes, the trial is set, yes.

QUESTION: Well, I don't understand, then. If you are getting all of that process, and that's the heart of your constitutional claim, I'm missing something. You're saying that your constitutional argument is that, under the Federal statute, he is entitled to full due process. He's in the middle of that now. However that comes out, he's in the middle of it.

MR. ELGIN: That's right.

QUESTION: All right, so what am I missing ?

MR. ELGIN: Well, there are two questions there. One, while the Petroleum Act, in section 2806(a), appears to at least procedurally preempt, along with the procedural sections of the Act, you have to read them, too, common law claims, it doesn't preempt other Federal claims. Secondly, it only gives the right of action against the franchiser, so if there are other parties involved and they have committed a civil rights violation --

QUESTION: Well, what is the civil rights violation ? I asked you that question, and you said the civil rights violation is that we're entitled to process under the Federal Act. you're getting it now.

MR. ELGIN: No, no, I'm sorry, I said two things. One, we're entitled to due process, in other words, our client was

entitled to a full follow-on preliminary injunction hearing, which he was deprived of by this maneuver.

QUESTION: On what claim ?

MR. ELGIN: On his counterclaims and --

QUESTION: On the Federal statute ?

MR. ELGIN: In the Superior Court.

QUESTION: On the Federal statute ?

MR. ELGIN: No, no, I'm talking about due process on his common law counterclaims that are still in Superior Court.

QUESTION: You're saying the other alleged constitutional violation is -- that is what I asked you 5 minutes ago -- is there something about the D.C. procedure that violates the constitution ? Is that the heart of your claim under 1983 ?

MR. ELGIN: Yes. Yes.

QUESTION: That is that there was an ex parte ?

MR. ELGIN: That's right, the procedure allowed an ex parte procedure, which,

without notification to the most important party, the owner of the franchise, not only attached that franchise, it went beyond that, it took it away from him and effectively destroyed his ability to get it back completely.

THE COURT: Your time is up. I will give you some time on rebuttal, unless there are some other questions.

MR. ELGIN: My red light is on. Thank you.

THE COURT: Mr. Forester ?

ORAL ARGUMENT OF J. GORDON FORESTER, JR., ESQ., ON BEHALF OF APPELLEES

MR. FORESTER: May it please the Court: Your Honors, appellants claim that they never had an opportunity to amend. That is entirely incorrect. The complaint was served in the court below sometime in november of 1989. The motion to dismiss on behalf of sun refining and marketing was filed on November 29, 1989, and the motion

by Jones-Day defendants was filed on November 30, 1989.

Now, Judge Oberdorfer rendered his decision on October 2, 1990, so they had approximately 10 months to amend the complaint, if it were, in fact, amendable. The motions to dismiss, Your Honors, were simply on insufficiencies out of the complaint, spelled out in detail, why they did not make a claim.

QUESTION: What is your position of the applicable rule on -- was there a decision on the motion to amend ?

MR. FORESTER: The motion to amend, Your Honor, was not filed until January of 1991.

QUESTION: After the fact.

MR. FORESTER: After the fact. This appeal was noted on November 1, 1990, so 3 months later, when the District Court no longer had jurisdiction, they filed a motion to amend.

QUESTION: Do we have jurisdiction in this case, counsel ?

MR. FORESTER: Yes, Your Honor, in my view you do. Jurisdiction is based upon the fact that the final decision to dismiss was issued, filed on October 2, the appeal was noted on November 1, and we argued below that the District Court did not have jurisdiction to hear the rule 60(b) motion.

QUESTION: Because that was filed after the notice of appeal ?

MR. FORESTER: Well, I heard today that they were filed simultaneously, Your Honor. I know they were filed on the same day, but --

QUESTION: What is they were filed simultaneously ? You agree, if the 60(b) motion had been filed before the notice of appeal, we wouldn't have jurisdiction ?

MR. FORESTER: It would not be ripe for appeal, if the 60(b) motion had filed be-

fore. My view is, Your Honor, when you file the notice of appeal and you do it -- say if it were simultaneously, we look up to the Fifth Floor and say this Court has jurisdiction. We believe that is the law.

QUESTION: Do you have any cases ?

MR. FORESTER: We have cases the other way, that the District Court does not have jurisdiction in the area of the 60(b) motion when it is pending up here.

QUESTION: When it's pending, but what about this kind of circumstance, simultaneous, for example ?

MR. FORESTER: I don't have a case on that, Your Honor. I don't know that I've ever seen that situation.

QUESTION: Well, if that's the situation we have, is there any guidance ? Are those in the preferences of the courts ? I mean that is what this case is coming down to.

MR. FORESTER: I can only stress the procedure, Your Honor is that when you note the appeal below, the District Court puts together the jacket and the case comes up here.

QUESTION: If the Clerk's Office also has a 60(b) that's been filed at the same time or maybe an hour before, an argument could be made -- I don't know, I mean I'm just thinking out loud - an argument could be made that they can't put that other jacket together, beause there was a 60(b) filed first.

MR. FORESTER: That certainly didn't come up below, Your Honor. They only --

QUESTION: Well, it wouldn't have come up below, as you are arguing it, and now it is just in the hands of the Clerk's Office, they are just going to march along in different directions.

MR. FORESTER: We went before Judge Oberdorfer on February 1, and he asked us

at that point in time, does the District Court have jurisdiction, and our position was absolutely not.

QUESTION: Well, I have no doubt what your position was, but what else was said, anything ? I mean was the contention made that the 60(b) motion had been properly filed and blocked, or what ?

MR. FORESTER: Your Honor, I know the argument was made, but I don't recall the specifics of that argument, I'm sorry.

QUESTION: But we have an obligation to decide whether we have jurisdiction as an initial matter. We have to make that decision in this case. What Judge Oberdorfer decided is not binding on us.

MR. FORESTER: I realize that, Your Honor.

QUESTION: Well, how can we make that decision, if we don't even know whether the motions were filed -- your brief says they were filed the same day.

MR. FORESTER: That's right, they were filed the same day.

QUESTION: What does the docket sheet show ? Which came first ?

MR. FORESTER: The docket sheet was not filed in the appendix, your honor.

QUESTION: How many volumes were filed in the appendix ?

MR. FORESTER: Five.

QUESTION: Five volumes, and you don't have the docket sheet in there ?

MR. FORETER: Your Honor, I didn't file any of those.

QUESTION: I understand.

MR. FORESTER: I had no input into those five volumes.

QUESTION: You see, in the District Court, when they heard that 60(b) motion in February --I'm sorry, I'm answering a question I'm trying to get an answer to. when the District Court heard argument in February, was it hearing argument on the

60(b) motion to amend and everything else sanctions, they were all --

MR. FORESTER: Your Honor, the sanctions -- the District Court --

QUESTION: Forget the sanctions. Did they hear argument on the motion to amend?

MR. FORESTER: No, Your Honor -- they did, yes.

QUESTION: You see, that suggests that the District Court apparently assumed, beause he's no dummy, he understands that if it was filed after the fact, he had lost jurisdiction, and he seemingly thought he had jurisdiction.

MR. FORESTER: Your Honor, he opened that argument that day by asking if the District Court had jurisdiction, he wanted to hear argument on that. We argued that he did not have jurisdiction. He said then --

QUESTION: And the other side argued that he did.

MR. FORESTER: And then the court assuming I do have jurisdiction, what is your position.

QUESTION: But it is such a simple thing for a District Court judge, especially one that has been around awhile, is not a stupid person, to look and see that the 60(b) was either there or not. If it had been filed 3 weeks later, I suspect Judge Oberdorfer would say you're out, there's nothing to discuss, I don't want to hear any more argument. Apparently that's not what the jacket is going to show us. It sounds like the jacket is going to show us they were filed together.

MR. FORESTER: They were filed the same day, but one will be before the other.

QUESTION: That's right, but now it sounds unbelievable that this case has come to this. We have to write a new rule and we have no guidance from anyone as to what we do in a circumstance where a 60(b)

and a motion to appeal have been filed simultaneously.

MR. FORESTER: I'm sorry, Your Honor, this issue did not come up in any of the briefing.

QUESTION: Well, it did come up, apparently.

QUESTION: Was Judge Oberdorfer asking you about rule 11 ?

MR. FORESTER: No, Your Honor.

QUESTION: He was asking just about the 60(b) ?

MR. FORESTER: About the 60(b).

QUESTION: He had jurisdiction over the rule 11 proceeding, despite the fact --

MR. FORESTER: Yes, your honor.

QUESTION: Even if a valid notice of appeal were filed, he had jurisdiction over that.

MR. FORESTER: That's correct. I didn't get to the merits of my argument that this

complaint is not amendable, and should the --

QUESTION: Go ahead, finish up on that. what is your argument -- I mean I'm not sure how we would get to that if the 60(b) was not properly before the District Court and there was a motion to amend ever before the District Court and that can't be reversible error, so why would you argue it ? If it was before the District Court, then we would have to send it back, because we don't have jurisdiction, so why would we even consider whether it is amendable ? Either the district court had it properly there and if it did, we shouldn't decide it, or it didn't, and if it didn't have the 60(b) before it, then there was no motion to amend and you win, because counsel has pretty much conceded, although he is hedging a little bit on one piece of his case. he is conceding a lot, in terms of what the complaint didn't say.

MR. FORESTER: So, with that concession, Your Honor, and clearly he's saying either it has to be amended or it cannot stand.

QUESTION: Well, at least on a good half of the case. Im going to give him the benefit of the doubt, on one piece he has hedged a little.

MR. FORESTER: Did he hedge on 83 or 85?

QUESTION: 83, I think. if I am wrong, he will tell me on rebuttal. My recollection is that he is hedging on 83.

MR. FORESTER: Well, Your Honor, the gravamen of that argument on 1983 is that the consent order somehow amounted to state action, and, Your Honor, in your opinion as already written, that consent order was nothing more than a private agreement between two parties, and, clearly, Dennis v. Sparks I think applies, a 1980 Supreme Court case, which says that invoking a judicial process does not

transform essentially private conduct into action of the state.

QUESTION: But wasn't it signed by the judge and thereafter enforceable, as such?

MR. FORESTER: Your Honor has already ruled that that was a private agreement.

QUESTION: No, no, keep going, it may have been a private agreement, but I don't know that I ruled on anything with respect to whether or not it was then executed by the court, became a document of the court and thereafter enforceable as a document of the court.

MR. FORESTER: Well, it clearly did become a document of the court, but it is oriented --

QUESTION: Isn't that the theory they would be trying to weave out, if they could amend ?

MR. FORESTER: Your Honor, if they could bring in this unconstitutionality of rule 12(i), which, by the way, was not pled be-

low, they have raised this on appeal for the first time we have heard it.

QUESTION: Well, that's the argument they're making. They are saying you can find it, if you search real hard.

MR. FORESTER: Well, it is --

QUESTION: What was the quotation from -- was it Dennis v. Sparks?

MR. FORESTER: Yes, Your Honor. To quote accurately, invoking a judicial process, of course, implicates the state and its officers, but does not transform essentially private conduct into actions of the state, i.e., --

QUESTION: Is that consistent with Shelly v. Cramer ?

MR. FORESTER: I think so, but they --

QUESTION: Do you want to think a moment again, pause a little bit before you give your answer ? Shelly has a big sweep.

MR. FORESTER: Well, this is a Supreme Court -- they mention injunctions in that

same quote, Your Honor, and they say petitioner's remedy lies in a private suit for damages, which he has had below. there is his due process, as your honor pointed out.

QUESTION: On the Federal game, I understand.

MR. FORESTER: Your Honor, I would respectfully move the admission of Mr. Brian P. Maschler, to argue pro hac vice for the Jones-Day appellees. Mr. Maschler is a member of the Bar of California.

QUESTION: He has just said he doesn't want to bother, now that the case has changed so much.

(laughter)

THE COURT: All right, we will receive him.

MR. FORESTER: Thank you.

THE COURT: Stay within the context in which we have now found ourselves.

ORAL ARGUMENT OF BRIAN P. MASCHLER, ESQ. ON BEHALF OF APPELLEES

MR. MASCHLER: Very well, Your Honor. May it please the Court: My name is Brian Maschler, Jones, Day, Reavis & Pogue law firm, and I represent appellees Jones, Day, Reavis & Pogue, Millard Ottman and David Roseman.

On the jurisdiction question, we argued below at the February 1 hearing that the District Court did not have jurisdiction to entertain either the rule 60(b) motion or the motion to amend which was filed several months after the rule 60(b) motion. We cited to the court --

QUESTION: Which was filed when ? Let me make sure I understand. Which was filed when ?

MR. MASCHLER: The motion to amend was filed, I believe in January 1991. The order of dismissal came down on October 2 of 1990. Those dates I'm fairly certain of.

QUESTION: So, you're saying that the 12(b) was not filed simultaneously ?

QUESTION: 60(b) was filed on November 1st, along with the notice of appeal, correct ?

MR. MASCHLER: That's correct, and we cited to the court a few cases which indicate that, upon perfection of a notice of appeal, the lower court was divested of jurisdiction.

QUESTION: But those cases did not stand for the proposition that the District Court is to decide whether the rule that says once a notice of appeal is filed, the District Court has no further jurisdiction.

MR. MASCHLER: Correct.

QUESTION: But the District Court is not to decide that the notice of appeal was good or bad. That is up to the Appellate Court, that's up to us, and that's the question we are trying to decide. Judge

Oberdorfer would have had no basis whatsoever making a determination of whether that notice of appeal was defective, because the rule is, once it is filed, he loses jurisdiction, only to regain it when the appellate court decides the notice of appeal was defective.

MR. MASCHLER: I understand, your honor. That issue obviously was not before the lower court. The Switzer v. Marshall case indicates that the timing of the rule 60(b) motion vis-a-vis the timing of the notice of appeal is immaterial. Our position today is --

QUESTION: It was immaterial ?

QUESTION: For the District Court's jurisdiction.

MR. MASCHLER: For the District Court's jurisdiction, not --

QUESTION: That's a different question.

MR. MASCHLER: I know, a different issue. Our position is that what is before

the Court today is the legal sufficiency of the complaint as originally filed, the Court's October 2, 1990 order, not the subsequently filed motion to reconsider --

QUESTION: We won't get to it, if there's a 60(b) motion properly there that beats out the notice of appeal. You don't have anything to talk to us about, we would send it back, so you can't --

MR. MASCHLER: Well, these motions are still pending and as --

QUESTION: I don't know what that means. Do we agree that these were filed on the same day ? Is that --

MR. MASCHLER: I think that's accurate, Your Honor.

QUESTION: We don't happen to know who will be home in time, do we ?

MR. MASCHLER: I do not know that. We, in fact - this is an aside - did not receive the notice of appeal until November 27, 27 days after it was filed, so we

briefed the rule 60(b) motion on the assumption that it was validly before the District Court, only to learn later that it was not.

QUESTION: What do you mean, it was not? That you were going to argue that it was not.

MR. MASCHLER: We argued that it was not.

QUESTION: Why ? Based on what ?

MR. MASCHLER: Based on the filing of a notice of appeal the same day, and we can go around and around, and I understand the difference between the two issues.

QUESTION: If the District judge has not decided the rule 60(b) motion and if the appellants withdraw their notice of appeal, then the District judge would clearly have jurisdiction to decide that --

MR. MASCHLER: I would agree with you, Your Honor.

QUESTION: -- After which, if he ruled against the appellants, then they could appeal ?

MR. MASCHLER: That's correct.

QUESTION: So if he says to us today that he wants to withdraw, that's the end of it, right ?

MR. MASCHLER: That's correct, Your Honor. I would argue that --

QUESTION: Just say yes or no. If you want to say more than that, you can wait your turn.

MR. ELGIN: Yes, I would like to say more, but the appeal --

THE COURT: Well, let me hear it, because this is getting out of hand, and then I will let you have the time. Keep track of whatever time is due. Let me hear what he is going to say first, because if they are going to withdraw and you agree that it would then have to go

back, then it seems to me that's what we are going to do.

MR. MASCHLER: Mr. Elgin is going to be heard now, then ?

THE COURT: Yes. You have not lost your time, depending upon what he says.

MR. MASCHLER: Thank you.

ORAL ARGUMENT OF LAURENCE A. ELGIN, ESQ. ON BEHALF OF APPELLANTS

MR. ELGIN: I must apologize that I tried to cover everything here, but I left all my cases on these points, but I know most of them from memory.

Let me say that we have cases, I believe, that govern all of this here in the District. Switzer v. Marshall is --

QUESTION: Forget all of that. Tell the panel this: do you want to withdraw your appeal, because they concede that if you withdraw your appeal, it goes back and the District Court judge has a 60(b) motion, including your motion to amend, yes or no?

MR. ELGIN: Yes, I would be happy to.

THE COURT: Okay, that is it. All right.

Does either side have anything to say in response ?

ORAL ARGUMENT OF J. GORDON FORESTER, JR., ESQ., ON BEHALF OF APPELLEES

MR. FORESTER: Your Honor, I just want to say that I strongly object to that. We don't concede the question, in answer to Judge Randolph, that if they withdraw. We submit that they noted the appeal, we have perfected this appeal, we have reaped this appeal, we have gone through and indexed five volumes of joint appendices, at considerable time, effort and expense, and we would certainly, if this is withdrawn, we would move this court for counsel fees, at the minimum, but I hope --

QUESTION: Are you speaking for yourself or the Jones-Day --

MR. FORESTER: No, I'm sorry, Your Honor, I'm speaking for Sun Refining and Marketing Company.

QUESTION: I take it that you say you understand, if you move that way, you will simultaneously move for sanctions ?

MR. FORESTER: That's correct.

ORAL ARGUMENT OF BRIAN P. MASCHLER, ESQ. ON BEHALF OF APPELLEES (Continued)

MR. MASCHLER: May it please the Court: these circumstances certainly have not been the subject of briefing or of much consideration. We would respectfully request an opportunity to brief this question. Our position is the question of whether, assuming the rule 60(b) motion was filed before the notice and this court --

QUESTION: But you said you would agree, you tend to agree that if he withdraws the appeal, that it goes back to the District Court.

MR. MASCHLER: Well, Your Honor, it is our position that the October 2, 1990 order of dismissal is properly before this court. Now, I am not in a position to testify to the exact timing of the filings. I would think that burden would rest with appellants. However, as Mr. Forester indicated, the issues with respect to the October 2 ruling have been joined, appellants have conceded that the orignally filed complaint is defective, and if the court wishes to hear argument on why they cannot amend and why their tendered arguments about propriety of amendment are insufficient, I would be happy to offer those.

QUESTION: I just don't see how we can get to them if we don't have a ruling from the District Court on that, and we don't know if the district court had it before them to rule on. how can we --

MR. MASCHLER: It is our position, your honor, that the Court can rule that the lower court's October 2, 1990 ruling was correct, can uphold that order.

QUESTION: That's the dismissal with our consideration of the motion to amend.

MR. MASCHLER: Which was not pending at the time.

QUESTION: That's right, so I don't know why we would -- how can we ever get to the question of the motion to amend ?

MR. MASCHLER: I think the court can determine whether the belatedly filed motion to amend was properly before that court in the first instance.

QUESTION: Only if it's in the context of 60(b), right?

MR. MASCHLER: The motion to amend was filed months after the rule 60(b) motion.

QUESTION: It was filed in January, and the appeal was taken from the October 2nd order, so that whatever the judge did with

respect to the motion to amend cannot be encompassed within the notice of appeal.

MR. MASCHLER: That's correct, Your Honor. It was filed afterwards, and we are having starts and stops on this, and we have been put at a tremendous procedural disadvantage, and it is our --

QUESTION: We are totally sympathetic with that and we understand that. The only question, it seems to me, now is we have got to decide what to do with the 60(b). The District Court either did or did not have jurisdiction over something that was or was not there, and the only question is whether we are allowed the withdrawal of the appeal, and there is one request for consideration of sanctions, if that is allowed, and we will have to consider that, as well. We just want to know what you have to say on that.

MR. MASCHLER: We would like an opportunity to brief that issue, as opposed to make rather --

QUESTION: Why should there be sanctions? If the notice of appeal and the 60(b) motion are filed simultaneously, and if the law is, in that situation, a Federal Court of Appeals does not have jurisdiction, why should there be sanctions ? It was incumbent upon you just to file a motion to dismiss for lack of jurisdiction. You don't have to go through five volumes and index them and then write briefs and then --

MR. MASCHLER: I don't necessarily agree that the court of appeals was divested or deprived of jurisdiction by the act of filing a rule 60(b) motion. I would certainly argue the converse, namely, as we discussed earlier, that the district court did not have jurisdiction to entertain the 60(b) motion upon the filing, due

to the filing of the notice of appeal. That is because the rule 60(b) motion went to matters which were before the court on appeal.

QUESTION: But does that make sense ? The rule 60(b) motion, I take it, was timely filed. It asks the District Court to reconsider its decision, correct ?

MR. MASCHLER: Correct.

QUESTION: If we follow the rule that says no, you can't do that, because on the same day they filed a notice of appeal then the District Court does not have the opportunity to take another look at its decision pursuant to a timely filed motion. Why should that be the rule ?

MR. MASCHLER: Your Honor, the court below did not decide whether it, in fact, possessed jurisdiction to hear that motion. It is our position that it did not. I believe this court is in a position to assess that, and that if the lower court

did not, in fact, possess jurisdiction over the rule 60(b) motion, that the rule 60(b) motion is a dead issue, in effect, and that all that is properly before the court is the legal sufficiency of the complaint as originally filed and, as Mr. Elgin has conceded, was defective in numerous material respects.

QUESTION: There can be a situation where neither court has jurisdiction.

MR. MASCHLER: I suppose I could hypothesize such a situation.

I have nothing further on that issue. if the court is not inclined to entertain the merits of the original appeal, then I have nothing further.

Thank you.

THE COURT: Mr. Forester ?

ORAL ARGUMENT OF J. GORDON FORESTER, JR., ESQ. ON BEHALF OF APPELLEES

MR. FORESTER: May I just make a suggestion ? If this court goes the direction

it sounds like you are looking at, is there a procedure whereby this court could refer the 60(b) motion to Judge Oberdorfer for a ruling, so that it then comes back to this court, without having to go through what we have already gone through again ?

QUESTION: Well, all you have to do is put new covers on your briefs, if you want.

(laughter)

MR. FORESTER: I suppose.

MR. ELGIN: Gentlemen, may I have a rubuttal here ?

THE COURT: You may have a moment.

ORAL ARGUMENT OF LAURENCE A. ELGIN, ESQ., ON BEHALF OF APPELLANTS

MR. ELGIN: I would like to say that I think these procedural questions are covered. Switzer v. Marshall was mentioned for the first time at the February 1 hearing. That was a decision by Judge Rich-

mond Creech. It was never controlling law, and 11 months later -- and I am sorry I don't have it with me -- Judges Bazelon, Washington and Prettyman of this court, I remember it well, decided that that idea was nonsense, and they went along with Professor Moore's position that it wasted judicial resources and that the better practice was to go ahead and hear the motion below.

But the reason we did what we did was because of the Chastane decision, and I don't have that case with me, but it was Chastane v. Director of the FBI, whoever he was at that time, that was a decision involving the FBI man who was down with his girlfriend in Norfolk and he used his authority, I don't know, to intimidate somebody in a building or something -- at any rate, the point of it was that while it may not be clear what happens when you file these motions, once they have gone

and held the hearing, as he did on February 1, then it would be an abuse of discretion for the lower court not to entertain the rule 60 motion, even if it was arguably not timely or something of that sort.

QUESTION: It would be an abuse of discretion for what ?

MR. ELGIN: For the lower court not to consider the motion for reconsideration fully, beause in the Chastane case, what happened was the guy filed his rule 60 motion, the court sort of encouraged him, and then the lower court said, well, now I've decided you couldn't file a rule 60 motion.

By the way, we tried to file a brief --

QUESTION: Did you do the actual filing of the notice of appeal in the rule 60(b)?

MR. ELGIN: Yes.

QUESTION: Did you personally come down here and do that ?

MR. ELGIN: No, I did not. I just remembered that they were on the same day. I honestly don't remember which one got filed first. I just remember they were filed on the same day.

QUESTION: Did you have one person just take them both down to the Clerk's Office?

MR. ELGIN: I don't even remember that now, I honestly don't. I turned it over to other people. I just don't pesonally remember what happened. I just remember them wanting them filed the same day and that was done.

In the Chastane case, as I say, once the hearing was held, then it was held to be an abuse of discretion not to go forward with the reconsideration motion. We tried to file, by the way, a brief below after the hearing about the decision by Judges Washington, Bazelon, and Prettyman, showing that Switzer v. Marshall had never been law here, and the filing was reject-

ed, because the court didn't want to hear about it.

QUESTION: What, you asked us not to consider the appeal, because we didn't have jurisdiction ?

MR. ELGIN: I asked the court to consider that the position of Switzer v. Marshall was not correct and we had the right to go forward with our Rule 60 below --

QUESTION: Did you ask us not to consider the appeal, because we didn't have jurisdiction ?

MR. ELGIN: No, I did not, because it --

QUESTION: Why didn't you do that ?

MR. ELGIN: Because it wasn't clear to me.

QUESTION: Well, you seem to think its fairly clear.

MR. ELGIN: I'm sorry, I certainly --

QUESTION: It doesn't matter now.

MR. ELGIN: It certainly wasn't clear to me at the outset, let me say. In other

words once he held the hearing, I felt then we had a right to go forward with our motion and he couldn't find some reason to reject it, but, you know, I had to wait until that happened.

THE COURT: Okay. We will take the case under advisement. The case is submitted.

[Whereupon, at 1:30 p.m., the case in the above-entitled matter was submitted.]

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TYPE E APPEAL
JURY

U.S. District Court
USDC District of Columbia (Washington)

CIVIL DOCKET FOR CASE #: 89-CV-2397

HOAI, et al v. VO, et al Filed 8/28/89

Assigned to: Judge Louis F. Oberdorfer

Demand: $30,000

Lead Docket: None

Dkt # in other court: None

Jury demand: Plaintiff

Nature of Suit 440

Jurisdiction: Federal Question

Cause: 42:1983 Civil Rights Act

Case type: 1.civil

Thanh Vong Hoai plaintiff	John David Hemenway [COR NTC] 4816 Rodman Street,NW Washington, DC 20016 (202) 244-4819
	Laurence Allnutt Elgin [COR LD NTC] 8929 Sleaford Place Annandale, VA 22003 (202) 628-1114
JOHN D. HEMENWAY	John David Hemenway (see above) [COR NTC]

	Laurence Allnutt Elgin (see above) [COR LD NTC]
DAVID HEMENWAY	John David Hemenway (see above) [COR NTC]
	Laurence Allnutt Elgin (see above) [COR LD NTC]
v.	
THANH VAN VO	Robert James Pleshaw 628-3000 [COR LD NTC] LAW OFFICE OF ROBERT J. PLESHAW 729 15th Street, NW Securities Building, Suite 800 Washington, D.C. 20005
MILLARD F. OTTMAN, JR., defendant	Francis X. Markey 879-3440 [COR LD NTC] JONES, DAY, REAVIS & POGUE 1450 G Street, NW Suite 700 Washington, DC 20005-2088 (202) 879-3939
DAVID C. ROSEMAN defendant	Francis Xavier Markey (see above) [COR LD NTC]
JONES, DAY, REAVIS & POGUE defendant	Francis Xavier Markey (see above) [COR LD NTC]
J. GORDON FORESTER, JR.	

defendant

GEOFFREY WAGNER
defendant

JOSEPH ZULLI
defendant

John Gordon Forester, Jr.
[COR LD NTC]
GREENSTEIN, DELORME & LUCHS
1620 L Street, NW
Suite 900
Washington, DC 20036
(202) 452-1400

SUN REFINING AND MARKETING COMPANY, INC.
defendant

8/28/89	1	COMPLAINT filed summons (8) issued (ew) [Entry date 8/29/89]
11/13/89	-	SUMMONS issued (1) (mf) [Entry date 11/16/89]
11/13/89	2	RETURN OF SERVICE executed as to defendant J. GORDON FORESTER, JR. 11/9/89 by leaving with Ms. Ortiz, Receptionist (mf) [Entry date 11/16/89]

11/13/89	3	RETURN OF SERVICE executed as to defendant MILLARD F. OTTMAN JR. 11/9/89 by leaving with Diane L. Ferguson, Receptionist (mf) [Entry date 11/16/89]
11/13/89	4	RETURN OF SERVICE executed as to defendant JONES, DAY, REAVIS 11/9/89 by leaving with Diane L. Ferguson, Receptionist (mf) [Entry date 11/16/89]
11/13/89	5	RETURN OF SERVICE executed as to defendant DAVID C. ROSEMAN 11/9/89 by leaving with Diane L. Ferguson, Receptionist (mf) [Entry date 11/16/89]
11/13/89	6	RETURN OF SERVICE executed as to defendant THANH VAN VO 11/9/89 personally (mf) [Entry date 11/16/89]

11/13/89	7	RETURN OF SERVICE executed as to defendant SUN REFIN ING/MARKETING 11/9/89 by leaving with Ms Ragby, Secretary in Process Office (mf) [Entry date 11/16/89]
11/22/89	-	CASE REASIGNED to Judge Louis F. Oberdorfer by direction of the Calendar Committee (ajr) [Entry date 11/27/89]
11/29/89	8	MOTION by defendant MILLARD F. OTTMAN, JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS to dismiss as to defendant MILLARD F. OTTMAN, JR.,defendant DAVID C. ROSEMAN, defendant Jones, Day, Reavis Affidavits (3) (ajr) [Entry date 12/1/89]

DON FORESTER, JR., defendant SUN REFINING/MARKETING to dismiss Affidavit (ajr) [Entry date 12/1/89]

11/30/89 -- SUMMONS (1) issued (ajr) [Entry date 12/4/89]

11/30/89 10 MOTION by defendant THANH VAN VO to dismiss. Exhibit (ajr) [Entry date 12/4/89]

12/4/89 11 MOTION by defendant GEOFFREY WAGNER to dismiss (ajr) [Entry date 12/5/89]

12/5/89 12 MOTION by defendant SUN REFINING/MARKET for sanctions pursuant to FRCivP 11 Exhibit (ajr) [Entry date 12/7/89]

12/5/89 13 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to extend time to 12/20/89 in which

		to respond to various defendants' motions to dismiss (ajr) [Entry date 12/7/89]
12/9/89	14	COPY OF LETTER to Gasch, J. from plaintiff's attorney, John D. Hemenway, (fiat by Oberdorfer, Jr. (mon)
12/8/89	15	AFFIDAVIT OF SERVICE of summons and complaint upon defendants MILLARD F. OTTMAN, JR., (on 12/4/89), DAVID C. ROSEMAN (on 12/1/89), J. GORDON FORESTER, JR., (on 12/5/89), GEOFFREY WAGNER (on 11/21/89, JOSEPH ZULLI (on 11/30/89) (ajr) [Entry date 12/13/89]
12/12/89	16	MEMORANDUM by defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS in re-

sponse to motion to extend time to 12/20/89 in which to respond to various defendants' motions to dis miss [13-1] by DAVID HEMENWAY, JOHN HEMENWAY, THANH VONG HOAI, exhibit 1 is a reply in support of their motion to dismiss (cjp) [Entry date 12/14/89]

12/13/89 17 MOTION by defendant JOSEPH ZULLI to dismiss; exhibit (1) (cjp) [Entry date 12/15/89]

12/15/89 18 ORDER by Judge Louis F. Oberdorfer : granting motion to extend time to 12/20/89 in which to respond to various defendants' motions to dismiss [13-1] by DAVID HEMENWAY, JOHN HEMENWAY, THANH

VONG HOAI, respons to dispositive motions due 12/20/89, ; (N) (ajr) [Entry date 12/20/89]

12/19/89 21 MOTION by defendant THANH VONG VO for Rule 11 sanctions Exhibit (ajr) [Entry date 12/21/89]

12/20/89 19 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to extend time to 1/2/90 in which to file a comprehensive response to defendants' motions to dismiss (ajr) [Entry date 12/21/89]

12/20/89 20 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss

DAVID HEMENWAY in opposition to motion to dismiss [17-1] by JOSEPH ZULLI, motion to dismiss [11-1] by GEOFFREY WAGNER, motion to dismiss [10-1] by THANH VAN VO, motion to dismiss as to defendant MILLARD F. OTTMAN, JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS [8-1] by defendant, motion to dismiss [9-1] by SUN REFINING/MARKET, J. GORDON FORESTER JR. Attachments (2) (ajr) [Entry date 12/21/89]

12/20/89 22 REPLY by defendant JONES, DAY, REAVIS to response to motion to dismiss as to defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES,

DAY, REAVIS [8-1] by defendant. Attachment 9ajr) [Entry date 12/21/89]

12/21/89 -- SUMMONS (3) issued (ajr) [Entry date 12/21/89]

12/29/89 23 MEMORANDUM by defendants in opposition to motion to extend time to 1/2/90 in which to file a comprehensive response to JOHN D. HEMENWAY, THANH VONG HOAI; Attachment (jda) [Entry date 1/3/90]

1/2/90 24 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY to extend time to 1/16/90 to respond to Rule 11 motions from defendants THANH VAN VO, and SUN OIL (jda) [Entry date 1/5/90]

D. HEMENWAY, plaintiff DAVID HEMENWAY for a stay pending resolution of a question of Federal Rights (cjp) [Entry date 1/17/90]

1/11/90 26 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss as to defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS [8-1] by defendant. (fiat, OBERDORFER, J.) (ajr) [Entry date 1/17/90]

1/11/90 27 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D.HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss [10-1] by

THANH VAN VO. (fiat, OBER-DORFER, J.) (ajr) [Entry Date 1/18/90]

1/11/90 28 SUPPLEMENTAL RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss [9-1] by SUN REFINING/MARKET, J. GORDON FORESTER JR. (fiat, HARRIS, J.) (ajr) [Entry date 1/18/90]

1/11/90 29 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion to dismiss [9-1] by SUN REFINING/MARKET, J. GORDON FORESTER JR. Attachments (2) (fiat,

OBERDORFER, J.) (ajr) [Entry date 1/18/90]

1/12/90 30 ORDER by Judge Louis F. Oberdorfer : granting motion to extend time to 1/16/90 to respond to Rule 11 motions from defendants THANH VA VO, and SUN OIL [24-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI response to motion due 1/16/90 for DAVID HEMENWAY, for JOHN D. HEMENWAY, for THANH VONG HOAI ; (N) (ajr) [Entry date 1/18/90]

1/16/90 31 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to stay case indefinitely (ajr) [Entry date 1/18/90]

1/17/90	32	RESPONSE by defendant J. GORDON FORESTER JR., defendant JOSEPH ZULLI, defendant SUN REFINING/MARKET in opposition to motion to stay case indefinitely [31-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (ajr) [Entry date 1/19/90]
1/23/90	33	RESPONSE by defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS in opposition to motion to stay case indefinitely [31-1] by DAVID HEMENWAY, JOHN HEMENWAY, THANH VONG HOAI (ajr) [Entry date 1/26/90]
1/25/90	34	REPLY by defendant MILLARD F. OTTMAN JR., defendant

DAVID ROSEMAN, defendant JONES, DAY, REAVIS to response to motion to dismiss as to defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS [8-1] by defendant. (fiat, OBERDORFER, J.) (ajr) [Entry date 3/29/90]

3/27/90 35 SUPPLEMENTAL MEMORANDUM to motion to dismiss for failure to state a claim upon which relief can be granted and for insufficiency of process [17-1] by JOSEPH ZULLI; Affidavit (ker) [Entry date 3/29/90]

10/2/90 36 MEMORANDUM by Judge Louis F. Oberdorfer (N) (cjp) [Entry date 10/4/90]

10/2/90 37 ORDER by Judge Louis F.

Oberdorfer : dismissin this action, directing plaintiffs' attorneys John D. Hemenway and Laurence A. Elgin to show cause, if any, why they should not be subject to sanctions under Rule 11 of FRCP (N) (cjp) [Entry date 10/4/90]

10/19/90 39 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to order [37-3] with show of cause regarding proposed Rule 11 sanctions; attachment (ker) [Entry date 10/26/90]

10/24/90 38 ERRATA by plaintiff THANH VONG HOAI, re: docket no. 37; Exhibit (4) (ker) [Entry date 10/25/90]

11/1/90 40 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY for reconsider and correct its order of dismissal (ker) [Entry date 11/2/90]

11/1/90 41 NOTICE OF APPEAL by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY from order [37-3] entered 10/4/90; filing and docketing fee $105.00, paid, copies to Laurence Elgin, John Forester, Robert Pleshaw, John Hemenway (ker) [Entry date 11/2/90]

11/1/90 -- TRANSMITTED PRELIMINARY RECORD on appeal [41-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI

to U.S. Court of Appeals (ker) [Entry date 11/2/90]

11/19/90 -- USCA # 90-7170 assigned for appeal [41-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (ela)

11/20/90 42 MOTION by defendant MILLARD F. OTTMAN JR., defendant DAVID C. ROSEMAN, defendant JONES, DAY, REAVIS for sanctions and MEMORANDUM IN OPPOSITION to plaintiffs' Rule 60(B) motion (kk) [Entry date 11/23/90]

11/21/90 43 MOTION by plaintiff THAN VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to extend time to 12/14/90 to respond to motion for sanctions (kk) [Entry date 11/23/90]

11/21/90 45 ORDER by Judge Louis F. Oberdorfer : granting motion to extend time to 12/14/90 to respond to motion for sanctions [43-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (N) (ker) [Entry date 12/17/90]

12/14/90 44 RESPONSE by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in opposition to motion for sanctions [42-1] by JONES, DAY, REAVIS, DAVID C. ROSEMAN, MILLARD F. OTTMAN JR. (ker) [Entry date 12/17/90]

12/28/90 46 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to amend

complaint [1-1]; Exhibit (3), EXHIBIT (AMENDED COMPLAINT) (ker) [Entry date 12/31/90]

12/28/90 47 NOTICE OF FILING by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY of tab 11 to be attached to memorandum in support of their rule 60(b) motion; affidavit (1) (ker) [Entry date 12/31/90]

1/2/91 48 ORDER by Judge Louis F. Oberdorfer : , motion hearing set for 2:00 2/1/91 ; (N) (mon)

1/4/91 49 DEMAND for jury trial by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY (ker) [Entry date 1/9/91]

1/8/91 50 RESPONSE by defendant SUN REFINING/MARKET in opposition to motion pursuant to Rule 60(b) of the Federal Rules of Civil Rules (sic) and motion to amend complaint [1-1] [46-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (ker) [Entry date 1/9/91]

1/15/91 51 MEMORANDUM by defendant JONES, DAY, REAVIS in opposition to motion to amend complaint [1-1] [46-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI (ker) [Entry date 1/16/91]

1/18/91 52 SUPPLEMENTAL to motion for sanctions [42-1] by JONES, DAY, REAVIS, DAVID C. ROSEMAN, MILLARD F. OTTMAN JR.; Exhibit (1) (ker)

[Entry date 1/24/91] [Edit date 1/24/91]

1/31/91 53 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY for Rule 11 sanctions against defendants Sunoco and Forester (ker) [Entry date 2/1/91]

1/31/91 54 RESPONSE by plaintiff THANH VONG HOAI, plaintiff John D. Hemenway in opposition to motion for sanctions pursuant to FRCivP 11 [12-1] by SUN REFINING/MARKET; Affidavit (1), Exhibit (1) (ker) [Entry date 2/4/91]

2/1/91 55 MEMORANDUM by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY in support

of Rule 60(b) motion for reconsider and correct its order of dismissal [40-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI, Affidavit (2), Exhibit (11) "Fiat" J. OBERDORFER (ker) [Entry date 2/6/91]

2/1/91 -- MOTION HEARING before Judge Louis F. Oberdorfer : by JONES, DAY, REAVIS, DAVID C. ROSEMAN, MILLARD F. OTTMAN JR. motion for sanctions [42-1] heard and taken under advisement, by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI motion for reconsider and correct its order of dismissal [40-1] heard and taken under advisement

reporter: T. Dourian (ker) [Entry date 2/7/91]

2/8/91 56 MOTION by plaintiff THANH VONG HOAI, plaintiff JOHN D. HEMENWAY, plaintiff DAVID HEMENWAY to file combined opposition to the rule 11 motion by the Jones, Day defendants after hearing (memorandum in support stricken pursuant to order of 3/18/91, and returned to counsel for plaintiffs) (kk) [Entry date 2/20/91] [Edit date 4/1/91]

2/19/91 57 MEMORANDUM by defendant JONES, DAY, REAVIS in opposition to motion to file combined opposition to the rule 11 motion by the Jones, Day deffendants

after hearing [56-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI; Attachment (1) (ks) [Entry date 2/20/91]

3/18/91 58 ORDER by Judge Louis F. Oberdorfer : denying motion to file combined opposition to the rule 11 motion by the Jones Day defendants after hearing [56-1] by DAVID HEMENWAY, JOHN D. HEMENWAY, THANH VONG HOAI; directing Clerk to strike plaintiffs' memo in support of their motion to file an opposition to sprise (sic) argument, etc. (N) (mon) [Entry date 3/19/91]

3/28/91 59 TRANSCRIPT filed hearing on motions for dates of 2/1/91

reporter: T. der Dourian (ks) [Entry date 4/3/91]

3/28/91 60 ENTERED IN ERROR TRANSCRIPT filed of hearing on motions for dates 2/28/91 reporter: T. Der Dourian (ks) [Entry date 4/3/91] [Edit date 4/9/91]

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,	)	
	)	
Plaintiffs,	)	CA No. 89-2397
v.	)	Judge Louis F.
THANH VAN VO, et al.,	)	OBERDORFER
	)	Magistrate
Defendants.	)	P.J. ATTRIDGE
	)	

[STAMP: United States District Court
District of Columbia Jan 11 11:30PM
'90]

PLAINTIFFS' MOTION FOR A STAY PENDING RESOLUTION OF A QUESTION OF FEDERAL RIGHTS

COMES ON THE PLAINTIFFS, acting through counsel, to move this Honorable Court to stay all action in the above-captioned cause until dispositive cross motions for summary judgment now before this very Court are ruled upon (in: CA: 87-2456). In support of their motion, the plaintiffs offer the Court:

1. Defendant Jones, Day, Reavis & Pogue (hereafter: "Jones Day") and attorney defendants Roseman and Ottman of that firm have argued that there has been no

determination that a federal statute has been violated. Since that is the very issue now before the Court in cross motions, it would appear wise to settle that issue before moving on.

2. The stay of action, moved by the plaintiffs, therefore, would attenuate any duplication of effort, i.e., having to delve into factual patterns more than once, such as whether the agreement between the attorneys of Sun Refining and Marketing Company (hereinafter: "Sun Oil") and the attorneys of Jones Day who represented defendant Thanh Van Vo, violated the Petroleum Marketing Practices Act by the September 8, 1986 consent agreement signed by Jones Day)for Vo) and Sun Oil, which did not have to enter into such an agreement, although Sun Oil has subsequently represented on nearly every possible occasion that this was required by the Superior Court temporary retraining

order or the Superior Court itself, a violation of Hoai's contractual rights and a violation of the PMPA.

3. The requested stay would prejudice no party nor cause any additional burden; on the contrary, it would mitigate the expense of the litigation in the case at bar, which already is into its fourth year.

4. This motion is timely filed. Further, counsel for Sun Oil has complained to this Honorable Court of the amount of effort required to be expended in the PMPA case and Sun Oil already has failed to respond to five different motions raised by the plaintiffs on substantive matters before the Court. These matters involve chiefly matters in which Sun Oil has failed to state in a sworn affidavit matters it wishes to place into the record, no doubt, because counsel for Sun Oil may well know better than the plaintiffs, that

the principal witness upon which Sun Oil relies in the PMPA case, Thanh Van Vo, is demonstrably a mendacious deceiver, capable of any kind of fabrication.

5. As sole practitioners, co-counsel for the plaintiffs ar not unsympathetic to the plight of an overworked attorney, even if Sun Oil's counsel is backed up by a large law firm with resources available far exceeding those of the plaintiffs. Moreover, Sun Oil may not be spending its resources wisely, making lengthy petitions for sanctions against the plaintiffs, who have brought all of their actions in good faith, rather than addressing the merits of the case before them both in the case at bar and the PMPA case (CA 87-2456). Even though the plaintiffs are confident that they will prevail on the merits they certainly do not want to deprive the defendants of a fair chance to present their case, if they have a case. Un-

fortunately, the record in the PMPA case and this and all other actions which the defendants have enjoyed putting on the record (as if crying out for justice and filing in appropriate courts for separate causes of action were wrong) and dodging service in the crassest of fashions, suggests that the defendants want the court to decide on summary actions before the facts can possibly become known to the Court, and thus to prevail by practicing a deception on the Court.

6. Nor do the plaintiffs want this Honorable Court to miss the opportunity to view and set down its views for the benefit of the District of Columbia Bar, in a definitive written opinion and memorandum, <u>in all its raw and naked ugliness</u>, the story of attorneys manipulating distinct minority groups, discriminated against, in order to win lage sums of money themselves and their clients by

using the Rules of this Honorable Court to deceive the Court. Their style has been from the initiation of the first suit by Jones Day to tax the resources of the victim beyond endurance so that his case collapses, not because of lack of merit, but because he has been stomped on and crushed by an economic in this case and will, in the end, fail, if justice prevails and if the plaintiffs are granted a chance to bring out the facts needed by the Court to understand what is going on.

WHERFORE, defendants pray that their motion for a stay will be granted. A stay is requested on all action in the within captioned cause until discovery is complete in Hoai v. Sun Refining and Marketing Co. (CA 87-2456), when that issue, now before the Court, is decided and when the cross motions for summary judgment that are now before the Honorable Court also are decided.

Respectfully submitted,

FOR THE PLAINTIFFS
John D. Hemenway DC#379663
4816 Rodman St., N.W.
Washington, D.C. 20016
(202) 244-4819

Laurence A. Elgin DC#159582
8929 Sleaford Place
Annandale, Virginia 22003
(703) 425-7879

CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of January, 1990, he mailed the within-contained motion and attached draft order and memorandum of points and authorities in support thereof, to the following at the addresses indicated below, by first class mail, all postage prepaid.

Jones, Day, Reavis & Pogue
Attn: Francis X. Markey, Esq.
1450 G Street, N.W.
Washington, D.C. 20005

J. Gordon Forester, Jr., Esq.
1220 19th St., N.W. Suite 300
Washington, D.C. 20036

Robert Pleshaw, Esq.
729 15th St., N.W., Suite 800
Washington, D.C. 20005

John D. Hemenway

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,	)	
	)	
Plaintiffs,	)	CA No. 89-2397
v.	)	Judge Louis F.
THANH VAN VO, et al.,	)	OBERDORFER
	)	Magistrate
Defendants.	)	P.J. ATTRIDGE
	)	

[STAMP: United States District Court
District of Columbia Jan 11 11:30PM
'90]

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ORDER

This matter came to the Court's attention on the plaintiffs' motion for a stay on any action in the above-captioned cause on the grounds that such a stay is expedient; in the interest of judicial economy until the PMPA cause of action is determined in the related case before this court: (CA-87-2456); and, that such a stay would not harm or prejudice any party with unnecessary delay and would help limit the

time and money expended in this litigation.

Having considered the record and the arguments of the plaintiffs and opposition thereto and having considered the positions of all the parties, in both of the related cases, it is this _____ day of January, 1990, hereby:

ORDERED:

The defendants' [sic] motion is granted. All action on CA-89-2397, Hoai, et al., v. Vo, et al., will be stayed until discovery is complete, if any discovery is granted; and, in connection with the cross motions for summary judgment now before the Court, until after the motions themselves have been decided by the Court.

LOUIS F. OBERDORFER, JUDGE
UNITED STATES DISTRICT COURT

cc to:

(1) J. Gordon Forester, Jr., Esq., Suite 300, 1220 19th Street, N.W., Washington, D.C. 20036;

(2) Jones, Day, Reavis & Pogue, Attn: Francis X. Markey, Esq. 1450 G Street, N.W., Washington, D.C. 20005

(3) Robert Pleshaw, Esq. (For: Thanh Van Vo), 729 15th St., N.W., Suite 800, Washington, D.C. 20005

(4) John D. Hemenway, Esq., 4816 Rodman St., N.W., Washington, D.C. 20016; and,

(5) Laurence A. Elgin, Esq., 8929 Sleaford Place, Annandale, Virginia 22003

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,)CA # 89-2397
Plaintiffs.)Judge Oberdorfer
v.)[STAMP: USDCDC
THANH VAN VO, et al.,)Jan 11 11:30PM
Defendants.)'90]

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF: PLAINTIFFS' MOTION FOR A STAY PENDING RESOLUTION OF A QUESTION OF FEDERAL RIGHTS

I. DEFENDANTS ROSEMAN, OTTMAN AND THE LAW FIRM OF JONES, DAY, REAVIS & POGUE PROFESS TO BE UNAWARE THAT THEY VIOLATED ANY FEDERAL STATUTE:

The above defendants argue that:

> "As admitted in the Complaint, none of the plaintiffs was a party to this consent order; indeed, it explicitly excluded plaintiffs from its reach. Accordingly, the pendency of the consent order impaired no legal right of plaintiffs whatsoever ..." (p. 28, Memorandum of Defendants Millard F. Ottman, Jr., David C. Roseman, and Jones, Day, Reavis & Pogue In Support of Motion to Dismiss" hand delivered on November 30, 1989, hereafter identified as "Jones,Day Memorandum".)

This argumentation is disingenuous. It must be obvious to Jones Day Reavis & Pogue (hereinafter: "Jones Day") and its attorneys that it is quite possible for

two parties (in this case Sun Refining and Marketing Co., hereafter: "Sun Oil" or "Sunoco") to reach a bilateral contract the terms of which are harmful to third parties as is alleged in this case. The consent order was nothing more than a bilateral contract. As alleged in the related case before this Honorable Court captioned: THANH VONG HOAI V. SUN MARKETING AND REFINING CO., U.S. DIST CT (DC), CA: 87-2456, the so-called "consent order" of September 8, 1986, terminated the Hoai franchise, thereby preventing Hoai's earning a livelihood from that source.

The three defendants do not seem to grasp that the temporary restraining order to which they refer lasted for ten days only and ceased to exist more than three years ago. The TRO has no binding effect upon any of the parties to the earlier, related case or to any of the parties of the case at bar. Neither did the

temporary restraining order recognize any status quo, as alleged by the three defendants, for temporary restraining orders do not confirm status quo, preliminary injunctions are for that purpose. There was no preliminary injunction given in the Superior Court case fallaciously invoked here by Jones Day, and attorneys Ottman and Roseman, so Jones Day and its attorneys are raising matters ot applicable here. Even if TROs could determine the status quo, which they can not and do not, in any event, a status quo can only be recognized if it is the last uncontested status. See: Westinghouse v. Free, (CA7) 256 F.2d 806. Further, the so-called "consent order" which Sun Oil claims grew out of the allegedly court-confirmed status quo (which is not a function of TROs as mentioned) was not a product of the Superior Court, but of Jones, Day Sun Oil and their attorneys. The

United States Court of Appeals for the District of Columbia has ruled that "The consent order did not represent an exercise of the Superior Court's independent judgment and Hoai has not attacked that judgment." Hoai v. Sun Refining and Marketing Company, Inc., 275 U.S. App. D.C. 397 (1989), at p. 401.

Even Sun Oil's preposterous assertion that the consent agreement confirms the status quo established by the TRO (blandly ignoring the fact that injunctions, but not TRO's, can establish what was the status quo) presumes that the TRO obtained by Jones Day and Sun Oil for Thanh Van Vo was legitimate, when, of course, it was not. To cite merely one problem: the bond which was a requirement was never paid during the entire life of the TRO. Further, no effort was ever made to decide any of the issues on the merits; when the TRO expired after 10 days, its effects

would have expired, too, had it not been for the scheme arrived at by Roseman, Ottman, Jones Day, Sun Oil and the attorneys representing this grand coalition of a large oil corporation and a large law partnership, who arranged the contractual deal for Thanh Van Vo as if under the color and authority of D.C. law. Yet it was a contract calculated to circumvent and to violate the Federal Petroleum Marketing Practices Act, 15 USC 2806 et seq.

At the TRO hearing, defendant Ottman had pledged to meet the "cash" bond by his own check (permission the judge gave only when Ottman claimed that the late hour prevented meeting the term of $3,000.00 "cash".) This was a necessary condition of the TRO. Ottman did not pay his own check into the register, nor did he draw on the account from Jones, Day. Instead, this Jones Day attorney had the street

"scrambler" (as Prosser would call him) who had no legal claim to the station, Thanh Van Vo, put up a check drawn on proceeds earned by the station that same Vo had illegally seized control of from Hoai. And the check for $3,000.00 he wrote payable to the Clerk of the Superior Court, District of Columbia, bounced, to boot. Jones Day had to know it had violated the terms of the TRO, yet it did not report that fact to the Court. Nor did it report to counsel for Hoai. Even the so-called "consent decree" required the continuation of the TRO bond and this could not be done, for there was no bond.

In short, the entire TRO operation was a fraud upon the court and the fact had to be known to attorneys Ottman and Roseman and their law firm, Jones, Day, for they personally violated the condition imposed on the TRO by the Court, i.e., a "cash bond" (check from Mr. Ottman allowed to

substitute.) The record from the Superior Court of the District of Columbia (Vo v. Sun Refining and Marketing Co., et al., 275 U.S. App. D.C. 397 (1989) has not yet been properly introduced into this court, which should be done, if the defendants seek to use the operation in that court in their defense. Until this is done, final action on the defendants Motion to Dismiss should be put off for this reason alone, justifying this motion for to stay action until dispositive motions in CA-87-2456 are dealt with. The original cause of action, brought by Thanh Van Vo against Sun Oil and Hoai and others in 1986 started this chain of litigation, of course, in the Superior Court of the District of Columbia (CA-7075-86) which action still continues. It is now placed on a stay by Judge Kennedy pending resolution of the PMPA questions in this Honorable Court. It is fair to say that the attorneys guid-

ing the filing of Thanh Van Vo's original complaint, with the help of attorney Michael Arif, Vo's attorney, had to violate a contract of settlement arrived at between Vo and Hoai, under the terms of which Ernest Peele of Sun Oil would decide who would get possession of the station (Peele decided for Hoai, in the presence of Vo and Hoai and their attorneys) and, following the settlement of that issue, a settlement payment to whomever money was due would resolve all other matters, following an inventory. The inventory was under way when Jones Day violated this settlement contract by advising Vo to sue Hoai. A motion asking for injunctive relief on these matters is pending in Superior Court of the District of Columbia, stayed by the action of Judge Kennedy.

Jones Day and Sun Oil have dragged a number of matters into this purely PMPA federal action better resolved in the Su-

perior Court where they began, and which court is seized with the action. If the defendants Jones Day or Sun Oil choose to argue the instant case from the record of the Superior Court of the District of Columbia, or appeals to the Court of Appeals of the District of Columbia, then they should introduce the record of that Court in significant context, so that this Honorable Court may refer to that record.

The substance of the problems that are introduced by dragging in allegations long adjudicated in and pertaining to a proper state function (i.e., the D.C. Court) are complicated and are addressed in the several motions recently filed in both actions before this court. The unnecessary time and effort and complication introduced by the defendants (in both actions) attempting to retry matters already resolved or before the Superior Court should be avoided by granting this motion.

Suffice it to say, that, in effect, the defendants violated a federal statute by agreeing to a de facto termination of Thanh Vong Hoai's franchise by means of a bilateral contract concluded with Thanh Van Vo which the defendants clothed in the color and authority of the laws of the District of Columbia by claiming that their bilateral contract was a "consent order" which they claimed to cite only to preserve.

The complaint in the case at bar has nothing to do with a lawyer's traditional function (Defendants' Memorandum of Points and Authorities in Support of Motion TO Dismiss For Failure to State A Claim Upon Which Relief Can Be Granted, served November 29, 1989, p.29 and generally, hereafter: "Memo") and the claim that Jones Day "secured this interim relief on behalf of their client" (Memo, p.2) or that Jones Day attorneys were merely law-

yers who "functioned solely as advocates for the interests of their client" (Memo, p.4). Rather, it has much to do with the violations of ethical standards, federal laws and the misrepresentation of the facts to the courts in an attempt to give the color of law to illegal actions that would have been defeated or without effect had they been attempted in the open, above board, such as the ex parte presentation of the so-called "consent order" that lacked the consent of three out of five parties in the case, which was based on a fraudulently obtained TRO (see above). More recently, in the plaintiffs' filing of January 2, 1990, on pp. 16-17 of the "PLAINTIFFS' OPPOSITION TO THE DISMISSAL MOTION OF DEFENDANTS ROSEMAN, OTTMAN AND JONES, DAY, REAVIS AND POGUE," it is noted that:

> "... the Petroleum Marketing Practices Act, 15 USC 2801 et seq., at 2808, specifically forbids a refiner of branded products who sells them to retailers as Sunoco did here to terminate a franchise except for one

of the five specific reasons set out in the PMPA at Section 2802, with the notice required by Section 2804 of Title 15. As this Court well knows by this time also, the officials of a major refiner covered by the PMPA, such as defendant Sunoco, are charged with a knowledge of that Act. But so is every member of the federal bar. As the testimony referred to supra of Mssrs. Peele and Vaughn and the admissions of defendant Forester in the PMPA case, together with summary alluded to in Attachment one [to the filing of January 2, 1990, entitled: PLAINTIFFS' OPPOSITION TO THE DISMISSAL MOTION OF DEFENDANTS SUN REFINING & MARKETING COMPANY, INC. AND J. GORDON FORESTER, JR."] make it abundantly clear that the actual decision-making officials of the defendant Sunoco had no conscious idea at all that they were doing anything, in giving the gas station franchise to the defendant Vo, other than obeying the order of the Superior Court as it was represented to them by the [attorney] defendants Wagner, Zulli and Forester. It is evident from the testimony that they never even thought of terminating plaintiff Hoai properly under the PMPA. Thus these defendants were, in making the false representation to the responsible Sunoco counsel and officials that they did make, acting consciously pursuant to the law of the District of Columbia concerning the orders of its courts that gave the defendants aid and comfort in making these false representations to the Sunoco officials who did, based on this information, act to destroy the franchise of plaintiff Hoai and harm the other two plaintiffs who had

committed to Hoai's cause."

II. IN DRAFTING THE ORIGINAL COMPLAINT FILED AUGUST 27, 1986 AND THE AMENDED COMPLAINT, ALLOWED BY THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ON MARCH 24, 1987, JONES DAY REAVIS AND POGUE AND ITS ATTORNEYS KNOWINGLY INCORPORATED THE FRANCHISE AGREEMENT BETWEEN HOAI AND SUN OIL DEMONSTRATING THEIR AWARENESS OF RELEVANCE OF THE P.M.P.A. FEDERAL STATUTE.

It is difficult enough for a major oil refiner to argue ignorance of provisions of the PMPA, but Jones Day submitted its August 29, 1986 Complaint on behalf of Thanh Van Vo, using its firm name and incorporating the Franchise Agreement signed by Hoai and Peele on March 31, 1986, as Exhibit No. 1. That exhibit mentions the PMPA on the top of the very first page giving the title and chapter of that federal act. Thus, Jones Day illustrated its full knowledge of the existence and application of the PMPA provisions of the law. Their protestations of ignorance of federal laws and constitutional provisions

of due process and ethical acts allegedly violated do not ring true.

III. EVIDENCE OF RACIAL DISCRIMINATION AND "BENIGN" NEGLECT OF A DISPUTE THAT WAS PURELY "BETEEN TWO VIETNAMESE" IS MORE EFFICIENTLY DEALT WITH AFTER THE COURT DISPOSES OF THE CROSS MOTIONS NOW BEFORE IT DEALING WITH TWO MOTIONS FOR SUMMARY JUDGMENT.

From the begininning of this action in this Honorable Court, Sun Oil took the position that they were mer "stakeholders" in a problem that had come between two squabbling Vietnamese, Hoai and Vo. It would take a major sociological analysis of that position to fully expose its essential racism. Plaintiffs have begun such a discussion in their attachment two to the Plaintiffs' Response to Defendants' Motions to Dismiss, filed January 2, 1990 (see especially the first six pages of the 21 page attachment.)

This posture by Sun Oil immediately raised two fundamental questions: (1) Why is is that a United States citizen of

Vietnamese origin, i.e., Hoai, should not have full due process before the United States Courts [for that matter, an alien who has found himself in the United States]; and, (2) Why is an American citizen of Asian origin less able than any other American citizen to be presumed unable to borrow money to finance a business, i.e., why should loan arrangements between Thanh Vong Hoai and Thanh Van Vo, solemnized by assurances made before Sun Oil's own corporate representative Ernest Peele, who was charged by his employer, Sun Oil, with the specific task of investigating the propriety of the financial arrangements, suddenly become not a loan, but a squabble among two Vietnamese. Could it be that Peele was considered unsuitable to represent Sun Oil in a District of Columbia trial because he is a Negro American and his obvious veracity would be taken by a District of Columbia

jury as self-evident ? It was J. Gordon Forester, Jr., counsel for Sun Oil, who introduced the racial overtones of Sun Oil's argument. Forester put it thus:

> **"This is a dispute between two Vietnamese nationals who once were friends .... Mr. Vo had previously been a student in this country which gave him a better command of the language. He testified that he assisted Mr. Hoai in becoming adjusted." (Defendant's Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Jugment., in Hoai v. Sun Refining, CA 87-2456, DCDC, p.1., paragraph 1, line 1.)**

At the very end of the same document, Sun Oil repeats the same argument:

> **"This dispute between two former friends and compatriots has generated enough litigation to fill a lifetime or tow; [sic] yet the facts are clear and most are not in dispute." (ibid. p. 18, para two, lines 1-3.)**

The above statements (supported by no sworn affidavits) are simply false in nearly every respect. Sun Oil's counsel Forester once advised Hoai's counsel John Hemenway against submitting lengthy depositions into the Superior Court record, for he had found such a practice

inadvisable. Clearly, in this case, Forester does not like affidavits at all--he prefers self-serving documents that can be interpreted in several ways with no liability incurred by the counsel introducing them. With respect to the statements cited above, it is a fact, that both Hoai and Vo are American citizens, and their Asian background is relevant to this case only to the extent that it has become an object of discrimination with respect to Thanh Vong Hoai and those supporting him. With respect to English competency, there are two sworn affidavits of the plaintiff Thanh Vong Hoai submitted by persons who knew him and his work in the American Consulate General in Da Nang.

(TAB #8, **Sworn Affidavit of Pastor Nga (peter) Nguyen, September 27, 1989, in the series filed October 12, 1989, docket numbers 103 and 142.**) Clearly, Hoai needed no help from Vo as a translator and he did

not request such help. With the help of Jones Day attorneys, this mythical (and prejudical) relationship was built into the flimsy shell of American-trained attorneys coaching Vietnamese clients into signing sworn affidavits that might "sell" an TRO to a hurried judge. And it worked on August 29, 1986, and has been a legal nightmare for Thanh Vong Hoai ever since, dispossessed from his service station by the joint action of Sun Oil and Jones Day, based on the perjurious affidavits Jones Day prepared and continued with the consent agreement of September 8, 1986. When the matter was removed to a federal court, in 1987, then as now, Jones Day (and Sun Oil) claimed there was no federal question. Therefore, when the specifically PMPA federal action against Sun Oil was commenced, virtually the first words that were uttered by counsel for Sun Oil to this Honorable Court were that Sun Oil was

a mere stake-holder in a squabble between two Vietnamese. This is as close to a racist statement as one might make in law. In effect, Sun Oil has attempted to exploit the myth that loans to raise capital, and enforcement of contracts were only for real Americans, but arguments between two individuals of Vietnamese extractions are mere racial squabbles between Asian ethnics about which the court need not be concerned. (like the Tong Wars? One Superior Court Judge evidenced his insight by making such a reference in open court. Please see the sociological observations in Attachment #2 to Plaintiff's Response to Defendants' Motions to Dismiss, especially section on "prejudice and stereotyping", filed January 2, 1990.) This lack of candor on the part of Sun Oil has misled this court into a situation which ultimately had to be corrected in the U.S. Court of Appeals.

But to its great credit, this Honorable Court was not confused about what was going on. Right from the start, this Court refused to be lulled into complacency by the siren's song of Sunoco's counsel Forester. This Court recognized the fact from the start that counsel for Hoai were asserting that, in effect, Sun Oil was not a mere stake-holder, as asserted, but had actually decided between the contending parties, and had, in fact, decided for Thanh Van Hoai. This was quite correct, of course, and in fact, Sun Oil was never neutral after September 8, 1986, when it signed the so-called "consent agreement" with attorneys of Jones Day, which trashed the franchise agreement Hoai had had with Sun Oil. It was an attorney-assisted "sell out" of Mr. Hoai's interests, accomplished without any notice to him or to the other parties, or without full information to the Court asked to

rubber stamp the contractual arrangements between the two consenting parties, Sun Oil and Vo. To this Honorable Court's everlasting credit, it refused to be deceived by the fact that Sun Oil was putting on this arranagment which was illegal under the PMPA and assured Hoai, ultimately, of receiving his day in Court.

However, the defendants named in this action, certainly all did their utmost to lure the Court into a trap by exuding the appearance of an agreement "having judicial origins" as Mr. Roseman might have put it[1] Roseman and Jones Day did much

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[1]1 Roseman did put this concept in the negative with regard to Mr. Hoai's Notice to Surrender the Premises, which was but another effort of Jones Day attorneys to insinuate that action of Mr. Hoai and the persons supporting him were illegal, while those of the street scrambler who was being coached to put false statements in the form of sworn affidavits by Jones Day attorneys, were being clothed in the color and authority of state (i.e., District of Columbia) law. See pleadings of Superior Court, Verified Complaint of August 29, 2986, and the amended verified Complaint lodged earlier, but filed with permission of Superior Court on March 24, 1987.

more than that. A false construction was put on every move by Mr. Hoai and his supporters to suggest that they were mavericks who would throw papers in the face of trusted retainers of Jones Day, rather than serve papers as gentlemen/attorneys are expected to do. Attorney Roseman fabricated such materials, in the belief of Thnh Vong Hoai out of prejudice and the keen desire to earn a fee from Thanh Van Vo, regardless of the source of the money to pay that fee. A sizeable amount of those payments were funds stolen from Mr. Hoai's station, as the checks written on the station account indicate.

To his personal credit, Jr. Gordon Forester, Jr. has privately told attorney John Hemenway that he personally did not believe the charge leveled against Hemenway by Roseman to the effect that Hemenway

was culpable of stealing some $7,000.00 in cash which Thanh Van Vo asserted he had hidden in the station[2] However, he never

---

[2]2 If one believe Vo's story, he put this $7,000.00 in a secret place. [Evidently he did this without telling anyone where this secret place was, so it is difficult to understand how anyone could use the money as an agent of his in his absence.] Vo claims to have done this immediately prior to departing for Canada where, when needed, he was promptly located by "beeper". To Mr. Hoai and his suporters, this souns more like the actions of a drug-dealer than a typical District of Columbia filling station operator. Especially when you reflect on the fact that there were <u>not one but two</u> **safes on the premises, one concealed and the "secret place" was in a decrepid desk drawer that could not even be locked.** Vo further claims that the money was needed to pay for gasoline shipments. However, this does not ring true, either, for Sun Oil no longer would accept anything in payment for gas shipments except certified checks, because Vo's deceitful action in not advancing the loan of $35,000 he claimed to Sun Oil's Peele and Hoai himself when all three met to discuss the matter resulted in a bounced check. Sun Oil called Hoai to tell Hoai that <u>only</u> certified checks would be accepted. <u>No cash</u> because of the danger of robbery and violence against the drivers of the gasoline transport trucks. Yet, Roseman, Ottman, and Jones Day continued to press this patently false charge, sullying the professional reputation of John Hemenway, David Hemenway and Thanh Vong Hoai, when any competent analysis would have revealed

has placed anything in the record to record his own personal distaste for attorneys like Roseman and Ottman using this kind of false swearing and use of innuendo to blacken a fellow attorney's name. On the contrary, he has watched, for three years, a proceeding which has been permitted to drag on because of his own actions in formulating a "settlement" with a man (Thanh Van Vo) with whom there should have been no settlement or legal compromise.

Judge Eilperin surely was not alerted to the PMPA implications of the order by either of the two parties (two out of five) who were promoting the consent order. Rule 54(b) of the Superior Court is

(Cont.)

the dubious nature of the charge. Seen in the overall picture, Jones Day and its attorneys kept these falsities in the complaint to blend into their total orchestration that their client was acting under the color of law, while Hoai and his suporters were capable of thievery.

the same Rule 54(b) of the Federal Civil Rules of Procedures and applies in multi-party cases. There was no Rule 54(b) determination and direction as mandated by that rule here. This shows that Judge Eilperin, though he may have been negligent in letting himself be tricked by Mr. Vo's attorneys, was not consciously in any way making a judgment or decree or issuing an order as opposed to approving a consent order. It was a situation that would concern most judges who surely hope that attorneys before them are candid and forthright, and careful not to conceal the full truth from the Court. And so, there was no judgment here, only consent, and, by Rule 54(b), the action was not terminated as to any claim or party. All that Judge Wagner did was to impose a TRO. If we leave all of the error which plaintiff Hoai claims was connected with that TRO aside, it still was only a TRO

more. Ten days and out. Perhaps Judge Wagner thought that she was restoring a status quo. If so she missed the mark badly. A status quo is defined in federal practice, for purposes of preliminary injunctions, as opposed to temporary restraining orders, as the last actual, peaceable, noncontested status which preceded the controversy before the Court. Westinghouse Electric Corporation v. Free Sewing Machine Co. (CA7 1958) 256 F2d 806. No such standard has been enunciated for TRO's and it is not the case that the imposition of a TRO, as a matter of law, infers that there has been a determination as to what the last peaceful uncontested status between the parties was. Such a determination is a standard for preliminary injunction proceeding and from a preliminary injunction's being granted, such a holding can perhaps be inferred, though even that is subject to challenge.

It certainly does not appear from the TRO proceeding before Judge Wagner that she took that preliminary injunction standard into account in the TRO proceeding in the Superior Court at issue here. Quite the opposite, in fact. If the transcript of that hearing were properly admitted in this case[3] it would show that in her obsession with imposign upon the proceeding concepts of "wrongful eviction" (not thought of or raised previously by the parties), she ignored clear, corroborated, uncontradicted testimony of Vo's threatening to murder and otherwise commit

---

[3]3 We note that defendant, in a distorting and improper fashion, has attempted to introduce misleading little bits of evidence from that proceeding, improperly seeking to use them as "facts" to support its motion and its opposition without properly introducing the transcript in its entirety or in the entirety of the relevant passages so as to cure the distortion and has done so, moreover, with regard to the plaintiff, whom it extensively deposed in this proceeding without being able to elicit testimony it could as easily distort, thereby violating a host of rules.

violence upon plaintiff Hoai. So it is evident that Judge Wagner acted completely obliviously to this important standard for preliminary injunctive relief in federal practice. No doubt Superior Court Judge Wagner thought that was all part of something that could be taken care of later at a preliminary injunction hearing and all she was concerned with was that a landlord not wrongfully evict someone.

The defendant Sunoco, having now been completely disabused of its theory that a consent order, in defiance of logic and the plain meaning of the term, was dictated to it by Judge Wagner, is trying to fall back in some vague and unarticulated fashion on a theory that if the consent order was not compelled, as it had represented to this Court, then it must be that plaintiff Hoai, while not collaterally attacking the consent order improperly,

is somehow improperly attacking collaterally the TRO. This is nonsense. One does not collaterally attack or not attack a TRO. They don't last long enough. When a party obtains one and then abandons it, as was here done by Vo with regard to Hoai, then it is as if the TRO never existed. It has no precedential value whatsoever.

The defendant and its counsel again try to misrepresent the situation to the Court and confuse and mislead he Court into another unjustifiable decision. Sunoco purposefully seeks to confuse the difference between a TRO and a temporary injunction.

They are not the same. A TRO absolutely goes no further than to preserve what the judge in question perceived as the status quo until the determination attendant upon a full hearing for a preliminary or temporary injunction. See Am Jur 2d "Injunctions" Sec. 10, "Restraining or-

ders.", especially the cases cited in note 10. If there is no such follow-on hearing and decision then the TRO expires and it is as if it never was. There is authority that, unless it is void a temporary injunction, as opposed to a TRO, even if that preliminary injunction is erroneous, is not open to collaeral attack, while it exists. AmJur 2d, Loc. Cit. Sec. 318, "Conclusiveness generally", and authorities cited at n. 9.[4] There is no

---

[4]4 It should be pointed out here that if it should be tried as an issue, it was the case in the Superior Court that the plaintiff Vo there "paid" for the bond set as a condition of the TRO by Judge Wagner in the TRO (tab 36-c of the collation of documents filed by the plaintiff on October 12, 1989) with an NSF (not sufficient funds) check drawn on the account of the gas station, which "bounced". See tab number 36-a of collation of documents filed by the plaintiff on October 12, 1989, in conjunction with the pending summary judgment motions. As the exhibit shows the check was never made good until long after the TRO had expired as to plaintiff herein and his fellow individual co-defendants in that case, the Hemenways. Since the bond was never posted the TRO was void.

authority that a TRO canot be collaterally attacked and there is no authority that a preliminary injunction or a TRO can't be criticized and their findings disputed after they have expired, especially where the party obtaining them let them expire. Yet here that appears to be Sunoco's continual argument, that plaintiff is improperly collaterally attacking a TRO.

It has taken three and one-half years to get to the stage of these proceedings in which there are motions before the court for summary judgment and two motions by the plaintiff that request more discovery against the defendant Sun Oil prior to any favorable ruling on the summary judgment motion of Sun Oil. There is certainly no need to interrupt this orderly conduct of the court's scheduled procedure to take dismissal motions out of order concerning the civil rights suit at bar.

The defendants claim that no federal statutes have been violated and therefore the suit against them should be dismissed. That matter is about to be determined by the discovery and summary judgment motions now before the court. In the interests of judicial economy and truth and justice, the prior actions before this Honorable Court should be considered first. Then all parties will know with some certainty how the Court intends to deal with the validity of the charges that the PMPA violations are valid. In the view of the plaintiffs this should effect a great economy on the time and energy the Court should anticipate will be expended in the case at bar.

WHEREFORE, the plaintiffs pray that their motion be granted to stay further proceedings until the Court concludes action on the cross motions for summary judgment and motions for discovery and re-

tion on the cross motions for summary judgment and motions for discovery and related motions to strike evidence and to rule as conceded various motions which defendant Sun Oil has not even bothered to file opposition.

Respectfully submitted
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al. Plaintiffs	)CA No. 89-2397)Judge OBERDORFER
v.	)
THANH VAN VO, et al. Defendants.	))

PLAINTIFFS' MOTION FOR AN INDEFINITE STAY

Clerk will please note: This motion impinges on the Rule 11 Motions filed by Defendants Thanh Van Vo (Docket No. 21) and Sun Oil (Docket No. 12) and has an effect on the Plaintiffs' Motion for a stay filed on January 11, 1990.

Comes now the plaintiffs, through counsel, to move this Honorable Court to place an indefinite stay on the action in the above captioned case, pending resolution of the petroleum marketing products case (CA No. 87-2456, Hoai v. Sun Oil) now before it.

In support of its motion, plaintiffs offer:

(1) A Report on the status of the other case (CA-87-2456), well known to this Court, which has ordered a hearing in the

case in three days, on January 19, 1990; (2) reasons why judicial economy will be promoted by granting the plaintiffs' motion; and (3) a memorandum of points and authorities.

For the convenience of the Court, an appropriate draft order is attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 16th day of January, 1990, he mailed the within-contained motion with attachments to the following at the addresses indicated below, by first class mail, all postage prepaid.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al., Plaintiffs	)	CA No. 89-2397
v.	)	Judge OBERDORFER
THANH VAN VO, et al., Defendants	)	

==========

ORDER

Plaintiffs move for an indefinite stay of all action pending resolution of a related petroleum products marketing case (CA-87-2456) which is now before this court.

It appears that judicial economy will be served by such a stay which will permit a determination of at least some of the issues in the related case that are logically determined prior in time to this case and since the stay will prejudice the interests of no party, it is this _____ day of January, 1990, hereby:

ORDERED: The plaintiffs' motion is granted. There will be an indefinite stay

on all action in this case pending a further order by the Court on the subject.

LOUIS F. OBERDORFER, JUDGE
United States District Court

cc:
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,)
Plaintiffs) CA No. 89-2397
v.) Judge OBERDORFER
THANH VAN VO, et al.,)
Defendants)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF: PLAINTIFFS' MOTION FOR AN INDEFINITE STAY

1. Attorney Forester (a defendant in the case at bar) who is also counsel for defendant Sun Refining and Marketing wrote to this Honorable Court on November 14, 1989 claiming that the case at bar is related to CA 87-2456, Hoai v. Sun Refining and Marketing Co. That letter inaccurately and prejudicially sets out common issues and events, but it is true that there are common issues of fact. (The Forester letter does not appear to be on the docket, but reassignment of the case is posted as November 22, 1989.)

2. Subsequently Forester filed a motion for Rule 11 sanctions against the

plaintiffs for having brought the suit. This motion is premature, to say the least, but it was joined by Mr. Pleshaw (representing Thanh Van Vo here and in CA-87-2456) who submitted a second copy of the Forester Rule 11 motion over his own name and asked for sanctions, too. Rather like panning for gold on the other fellow's claim, especially since the complaint was filed for good and valid cause. Further, over the past ten years, the case law on Rule 11 sanctions has expanded enormously as pointed out by the plaintiffs in their "MOTION FOR ENLARGEMENT OF TIME OF 14 DAYS IN WHICH TO RESPOND TO RULE 11 MOTIONS FROM DEFENDANTS THANH VAN VO AND SUN OIL". The arguments for deferring action in that matter as set forth in that motion clearly pertain and are incorporated by reference in this memorandum.

3. In any event, any Rule 11 action is dependent on the defendants being successful on the merits, and the plaintiffs are confident that the defendants will not be successful on the merits.

4. On January 12, 1990, the law clerk of this Honorable Court called to announce that Judge Oberdorfer would convene a hearing in the matter of Hoai v. Sun Refining on January 19, 1990 at 10:00. As of this writing, no order has been received as to a specific agenda, but clearly the outcome of that hearing will impact heavily on the case at bar and, further, that results of decisions made at that hearing, depending upon what is decided, may not be known immediately.

5. In the case at bar, several defendants have claimed that there is no federal issue. Plaintiff's responded to that claim with their motion filed January 11, 1990: "PLAINTIFFS' MOTION FOR A STAY

PENDING RESOLUTION OF A QUESTION OF FEDERAL RIGHTS". Since the arguments contained therein appear to apply to this request for an indefinite stay, the arguments therein are also incorporated by reference for economy.

6. It appears that there is a certain logic in resolving the PMPA case first (which is a federal question) before taking up the arguments of Jones Day and other defendants that the plaintiffs have not raised any federal questions in this, a related case. A lot of duplicate effort can thus be avoided. Because of this logical order, the plaintiffs suggest that an economy of the Court's time can be effected simply by placing a stay on activity connected with the case at bar pending the outcome of critical issues in Hoai v. Sun Refining, at the discretion of the Court.

WHEREFORE, the plaintiffs pray their motion will be granted for an indefinite stay of all action in the case at bar pending resolution of key elements of the PMPA case with the stay to be lifted at the discretion of the court.

Respectfully submitted,
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91-1341

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY
Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.
Respondents.

Appendix 2 to
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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May 13, 1991, 9:30 am

IN THE UNITED STATES COURT OF APPEALS
FOR THE DITRICT OF COLUMBIA

RECORD NO. 90-7170

THANH VONG HOAI, et al.,

Appellants,

v.

THANH VAN VO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS THANH VONG HOAI AND DAVID HEMENWAY AND JOHN HEMENWAY

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February 27, 1991

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THANH VONG HOAI, et al., Appellants,	)	
v.	)	USCA No. 90-7170
THANH VAN VO, et al., Appellees.	)	

==========

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

Appellants and Plaintiffs below: Thanh Vong Hoai, David Hearn Hemenway, and John D. Hemenway.

Appellees and Defendants below: Thanh Van Vo [we have no information whatsoever concerning Vo's alleged alias of "Thoi Van Vo"], Millard Ottman, Jr., David C. Roseman, Jones, Day, Reavis & Pogue, J. Gordon Forester, Jr.; Geoffrey Wagner, Joseph Zulli, and Sun Refining and Marketing Co.

B. RULINGS UNDER REVIEW

The Memorandum and Order signed October 1, 1990, but filed October 2, 1990 by Judge Louis F. Oberdorfer of the United States District Court for the District of Columbia in CV 89-2387 dismissing the appellants' civil rights action and requiring the counsel for the appellants to state why they should not be held for sanctions under Rule 11 without stating any specific reasons.

There is a related Memorandum and Order of October 1, 1990, but filed on October 1, 1990, also by Judge Louis F. Oberdorfer of the United States District Court, granting the chief plaintiff in the civil rights case judgment on the merits in a Petroleum Marketing Products Act (PMPA) case which is not being presented for review, but which is related because the decision on the merits had important, even a dominant effect upon certain aspects of the civil rights decision upon

which review is requested in that the same actors, facts and issues are bound together. Admittedly, the actors shift roles somewhat, but it is important to know about this case, too, which already has been before this court and in which the plaintiffs in the civil rights case prevailed. See: **Thanh Vong HOAI, Appellant, v. SUN REFINING AND MARKETING COMPANY, INC., 275 U.S. App. D.C. 397 (1989).** Since the decision by J. Oberdorfer on the civil rights cause of action was made the very same day (filed the next day) as the PMPA decision on the merits favoring the plaintiffs, the civil rights plaintiffs never received any kind of a hearing, opportunity to amend, or due process in the sense that the procedures for a Motion for Summary Judgment should have been followed instead of the rules applying to a Motion to Dismiss, which was not done, despite the fact that extensive materials outside

the pleadings were considered and cited by the trial judge in his memorandum.

C. RELATED CASES

The closely related case of Hoai v. Sun Refining, referred to above has been before this Court previously. There is also pending before the Superior Court of the District of Columbia a case which is stayed pending the outcome of the federal PMPA case of Hoai v. Sun Refining, USDC(DC) CA 87J-2456, which has been before this Court, as noted above. The Superior Court case initiated all of the litigation connected with the fact patterns common to the several actions **but was found not to be co-extensive** when the case was examined by this Court, in Judge Edwards written memorandum. (See Hoai v. Sun Refining and Marketing Company, Inc., at p. 401.) The D.C. Superior Court case is captioned: Thanh Van Vo v. Sun Refining

and Marketing Co., et al., (CA 7075-86), Superior Court, District of Columbia. Additionally, a R.I.C.O. case brought by Sun Oil franchisee Hoai against Thanh Van Vo and certain other parties in the United States District Court (EDVa.) was dismissed on the premise the "enterprise" consisted of only one criminal action, whereas, two or mere were required (at that time, evidently no longer) for commencing a R.I.C.O. action. That case, however, did not include any of the appellees in this case except for the principal actor who this train of litigation in the Superior Court, i.e., Thanh Van Vo and was brought to the attention of this Court during the oral arguments heard on December 12, 1988.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THANH VONG HOAI, et al., Appellants,	)	
v.	)	USCA No. 90-7170
THANH VAN VO, et al., Appellees.	)	

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether in 1986 provisions of Local Rule 12-I(b)(i) of the Superior Court of the District of Columbia, (which provided for virtually unfettered ex parte decisions) created, along with certain other regulations, customs and usages of the District of Columbia, a situation like that of the Virginia pre-judgment attachment statute in Lugar v Edmondson Oil Co. (1982) 457 US 922 so as to subject the private party defendants here to liability for their use of that rule and procedures to deprive plaintiffs below of federal constitutional and statutory rights, including:

A) due process,

B) equal protection,

C) to petition for the redress of grievances,

D) to freely associate as client and counsel and as client to have counsel

E) as principal and agents, to not have a valuable gas station franchise terminated illegally in violation of the Federal Petroleum Marketing Practices Act (PMPA) (15 U.S.C. 2801 et seq.),[1]

F) not to be injured in their person or property for being a party in a federal court and attending and testifying fully therein under 42 U.S.C. 1985(2),

G) to be free of 1985(3) conspiracies,

H) to enforce a contract under 1981 and

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[1]That there was such a violation by the defendant Sunoco is now a matter of res judicata in the related case which was formerly before this Court on intermediate appeal on the question of abstention.

I) to lease and hold property under 1982,

J) to have a valid bond for security as part of due process whenever property and rights are preliminarily interfered with.

2) Whether private attorneys are liable when using a Lugar-like procedure to deprive persons of such rights on behalf of their clients when they know or have reason to know that what they are doing is a deliberate use of the court's procedures and the color of its authority to deprive the plaintiffs of due process and the other rights set out above ?

3) Whether private attorneys are liable when they use such procedures maliciously and willfully including the use of false representations and other improprieties ?

4) Whether parties who conspire together to injure other parties in their

property for having previously attended and testified at a hearing in a federal court are liable to those parties under 42 U.S.C. 1985(2) ?

5) Whether parties who seek to bar equal rights to a minority group member because he is a member of his own minority group by cooperating with another member of that same ethnic minority where the latter individual is part of a group within that minority population that appears to be using classic techniques of extortion and threats to dominate its own ethnic group members by "private justice" which has the effect of barring members of the ethnic minority from equal access to American justice, are liable for 42 U.S.C. 1985(3) violations ?

6) Whether such activity used to prevent the enforcement by the ethnic minority group plaintiff and the non-minority people assisting him of a valuable service

station franchise contract makes the parties liable under 42 U.S.C. 1981 ?

7) Whether such activity used to prevent the plaintiff and those assisting him from exercising the right to lease and hold property violates 42 U.S.C. 1982 ?

8) Whether the lawyers who participate in these activities are liable even if they act maliciously and willfully and are charged with a knowledge that their acts are wrongful as evidenced by their acts and deeds, including false representations and deceit upon the court ?

9) Whether, where a judge has before him two related cases, one of which seeks 42 U.S.C. 1983 and other civil rights relief which would be greatly affected by the outcome of the other suit, and the other suit, which is under 15 U.S.C. 2801 et seq. is awaiting cross summary judgments, and the parties plaintiff move for stays in the civil rights suit pending the

outcome of the summary judgment motions in the other suit, is it error for the judge handling both suits to grant the plaintiff in both suits summary judgment in the PMPA case and then not allow any time to the plaintiff and his co-plaintiffs to amend matters in the civil rights suit in order to incorporate the effects of the PMPA judgment as anticipated before dismissing the civil rights suit ?

10) Whether, in the above situation it is error for the court to ignore the motions for stay in the civil rights case, convert the dismissal motions to summary judgment motions by entertaining and considering matters outside the record without warning or notice and on the same day that it grants the summary judgment victory to the plaintiff in the PMPA action dismiss the civil rights action of that same plaintiff and his two agents ?

11) Whether, in the above situation, it is error for the court to convert the dismissal motion to summary judgment without the fact statement required by local rules or without any further opportunity to develop or present facts or without opportunity to amend or to even request any discovery pursuant to Rule 56(f) or to modify pleadings and any hearing, contrary to a practice established over three years of litigation ?

12) Whether, where, simultaneously and as part of the dismissal order of the civil rights case the court, at the end of its memorandum, issues an unspecified show cause to the attorneys of the successful party plaintiff in the PMPA case to show why they shouldn't be sanctioned the same is error because of other factors which indicate, considered objectively, that the court has as its intention, the control of the plaintiffs' overall litigation in the

manner that General Powell stated he was going to treat the Iraqi army in Kuwait ?

13) Whether the use of a show cause for sanctions as an integral part of this dismissal order violates the established law on what the sanctions rule and statutes should not be used for and violates first amendment and due process rights and, potentially, at least the right to be free of the threat of excessive fines of an amercement type under the excessive fines clause of the Eighth Amendment ?

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from an order of the lower court, accompanied by a memorandum opinion, which dismissed a civil rights complaint filed by the plaintiffs/ appellants pursuant to motions brought pursuant to Rule 12(b), ostensibly on Rule 12(b)(6) grounds. The order and memorandum were

signed on October 1, 1990 and filed the next day. (V.2, JA, 786, 778-85) Though the motions were dismissal motions, filed principally pursuant to Rule 12(b)(6), materials outside the record, including affidavits, were filed and not excluded and were considered in forming the memorandum opinion. However, none of the requirements surrounding summary judgment motions, including filing the required fact statement, were observed.

The underlying factual situation is related to another cause, also before the same court below, which also has previously been before this Court. That is the related case of Hoai v Sun Refining & Marketing Co., Inc., a case under the Petroleum Marketing Practices Act (PMPA) 15 U.S.C. 2801 et seq. In that case Sun had used the device of a "consent order" between itself and a man named Vo, also Vietnamese like Hoai, which purportedly

was an extension of a TRO issued by a judge of the Superior Court of the District of Columbia to take a franchise away from its franchisee, the plaintiff Hoai (also the principal plaintiff here) and give it to Vo. Plaintiff/appellant Hoai in that case sued upon that as a termination of his franchise. That case was previously before this court on an intermediate appeal. Hoai v Sun Refining & Marketing Co., Inc. (CA DC 1989) 866 F2d 1515. In that intermediate appeal this Court decided that the court below had improperly sua sponte abstained from deciding the PMPA case on the theory that it should have been decided in the Superior Court of the District of Columbia.

After that decision and upon remand, on March 27, 1989, the plaintiff Hoai in that case moved for summary judgment on the question of liability only because this Court's opinion made it clear that since

the "consent order" in the Superior Court did not represent any independent judgment of a judge of that court the use of it to take the gas station franchise in question was a termination under the PMPA. On October 1, 1990 that motion was decided in favor of the plaintiff Hoai, also the principal plaintiff/appellant in this case. This was the same day as the dismissal order and memorandum appealed from in this case were handed down. So that the court below decided them in coordination.

Both of these federal suits were reluctant and rather later in the day and grew out of incidents in which the man Vo sued Hoai, Hoai's attorney and Hoai's attorney's son in the Superior Court of the District of Columbia in violation of a settlement agreement, the evidence of which is in the record now of the Superior Court case, under which Sun agreed to and

did award the gas station franchise to Hoai. Those same three individuals are the plaintiffs/appellants in this cause and this cause also grew out of what happened in the Superior Court in 1986-87 (CA 7075-86). The PMPA case was brought in the court below because the statute of limitations was running and action in disposing of the suit against the three present plaintiffs/appellants in the Superior Court was stalled.

Similarly, this suit was brought in this court as the three-year statute of limitations was running out in August of 1989, after the judges of the Superior Court made it known on the record that they would prefer that federal questions be settled in the federal courts and had in fact stayed action in that court on Mr. Vo's claim, which was originially principally against Sun and the three plaintiffs/appellants herein. Thus this

suit was brought as the statute was running and while the principal plaintiff herein was awaiting a decision on his summary judgment motion resulting from this Court's decision in his PMPA case. As with the earlier filing of the PMPA case the plaintiffs herein only filed this cause because earlier, in 1987, when they had removed the Superior Court case to the federal court, Judge Sporkin of this Court had remanded it, failing to discern the cardinal importance of the PMPA issues.

The theory of this case is that the action of obtaining the consent order in the Superior Court, which was achieved ex parte under a rule of that court, since repealed, that took place on September 8, 1986 and terminated the franchise of Hoai (as is now res judicata), along with certain other actions that were taken in order to set up that possibility and others, subsequently taken, to preserve

it, violated the civil rights of Hoai, as the principal plaintiff, and of his attorney and his attorney's son, who were acting as his agent. In particular, to the extent that the rules and procedures of the court were used to achieve the taking of the gas station franchise from Hoai and give it to Vo 42 U.S.C. 1983 was violated. Due process and the violation of the PMPA rights of Hoai and his agents were the most prominent of the federal rights violated under this color and authority of D.C. law. Although the PMPA clearly preempts all state and common law remedies in the area of termination or nonrenewal of a franchise (at least between the same parties) (15 U.S.C. 2806(a)) it does not appear in any way to preempt other violations of federal statutory rights that overlap with the rights it establishes and involve, as here, other parties in addition to the

two, the franchisor and franchisee, affected by the jurisdiction created by the PMPA.

To the extent that the ex parte action which resulted in the taking of the franchise from Hoai and giving it to Vo was intended to harm Hoai and his agents in their property for their having stood up to Vo at the TRO hearing and testified to his attempted violence and threats of violence (while Vo sat there and declined to testify) 42 U.S.C. 1985(2) was violated.

To the extent that it was known to the defendants that Hoai had been threatened by Vo and victimized by Vo's fraudulent and extortionate acts, or they had reason to know it, and they knew, therefore, that Vo was barring Hoai from equal access to justice because Hoai was Vietnamese and Vo and his colleague Thach and others of such an ethnic "gang" preyed upon their own,

and to the extent that they joined in that activity by choosing Vo over Hoai 1985(3) was violated. (See affidavit of Hoai as filed below, generally, JA Vol. III, para. 1121-1390, especially paras. 1353-1356).

Similarly, although not mentioned in the first complaint[2] the prevention of the plaintiffs/appellants' attempts to enforce Hoai's franchise contract violated section 1981 and the interference with the leasing and holding of the franchise arguably violated 1982. Several Bivens type direct violations of constitutional rights were also alleged, though not as separate counts

All of this centered around the use of the D.C. court's rules to eliminate Hoai's counsel, its case law and rules to elevate local landlord and tenant law above the

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[2]Plaintiffs/appellants were allowed no chance to amend, one of their complaints of error in this appeal, but they did subsequently propose to amend in connection with a Rule 60(b) motion.

PMPA, its judge in chambers rule to extend the TRO ex parte without notice or due process for the real party in interest. Then there was the practice and custom of that court that allowed the defendants to "post the bond" required by the TRO as a precedent condition with an NSF check drawn on the account of the plaintiff Hoai's own gas station, which the defendant Vo had taken over in violation of the PMPA. (Vol. II, JA para.1097-1102) Further, the bond, when it was finally really posted, after the TRO was over, was then allowed, under the custom and rules of that court, to be withdrawn so that it served as no security and no guarantee of due process whatsoever, constituting a further violation of due process.

As noted in the earlier case before this Court, the plaintiff appealed this

matter to the D.C. Court of Appeals and raised all the constitutional issues and civil rights issues. But that court simply waited until the "extension" of the TRO was over and then declared the matters moot and dismissed the appeal as such, stating that no decision on the merits had been made. In their arrogance of their control of that court's processes for their purposes, the defendants Vo, Roseman, Otman and Jones, Day filed a show cause against the defendants, falsely accusing them of violating the TRO. But when plaintiffs herein used that to challenge the legal sufficiency and merits of the TRO, as is proper, that court denied that without comment.

B. COURSE OF PROCEEDINGS

After the plaintiffs below, Hoai and the Hemenways, filed their complaint in this suit against the defendants, all of the defendants moved to dismiss, prin-

cipally under Rule 12(b)(6) for failure to state a claim. Though filed as such dismissal motions these motions relied upon affidavits and extensive matter outside of the pleadings. (Vol. I, JA para. 82-400) The Sunoco defendants in the civil rights case, Sunoco and its lawyers who were responsible for the actions in the Superior Court also moved for sanctions. (Vol. I, JA para. 492-513) Their sanctions motion relied in part upon an assumption that Sunoco, and not Hoai, would win summary judgment in the PMPA case and castigated Hoai's PMPA case as being as meritless as the civil rights case was alleged to be. The attorney for Vo filed a sanctions motion as well which merely referred to that of the Sunoco defendants and invoked it, requesting the same. (Vol. III, JA p.1599, lines 15-17).

At the time, of course, the plaintiff Hoai was awaiting decision on his summary

judgment motion in the related PMPA case which, because of the earlier decision of this Court, he was confident, correctly as it turned out, he would win. Therefore, after initial, somewhat sketchy oppositions to these motions, plaintiff Hoai and his fellow plaintiffs, the Hemenways, moved for two stays. First they moved for a stay until the summary judgment in the related PMPA case was decided because it was clear that the resolution of that case would do much to answer the 42 U.S.C. 1983 question in particular, not only as to whether or not the use of the color and authority of the D.C. Court had violated plaintiff Hoai's PMPA rights but also other rights. (Vol. III, JA para. 1410-1439) Then, further study showed that the resolution of the question of the termination under the PMPA would also affect greatly the other civil rights claims, principally because it would establish

whether or not Vo was a mere scrambler or had any pretext to own the franchise. (Vol. III, JA para 1435-1441) These motions, which were filed in January of 1990, were obviously intended to obtain a reasonable pause between the time of deciding of the PMPA summary judgment motion in the related case and the finalization of the briefing on the dismissal motions in this case which were obviously in reality summary judgment motions and would have properly required conversion, including fact statements and the other safeguards of summary judgment. These stay motions were opposed but were never ruled upon.

Instead, after much time had passed, on October 1, 1990 the court below decided both cases on the same day. (Vol. II, JA, p. 786) In the PMPA case the plaintiff Hoai obtained his summary judgment and the cross-motion of Sunoco was denied. In the

civil rights case the dismissal motions were all granted and the court, citing the sanctions motions filed by Sun, Vo and Sunoco's attorneys, as an integral part of its order dismissing the civil rights case, gave the plaintiffs attorneys, not the plaintiff, a little short of three weeks to show cause why they should not be sanctioned although just what it was that violated either Rule 11 or Rule 28 U.S.C. 1927 was not specified. (Vol. II JA p. 786) Since the sanctions motions had been based in significant part upon the incorrect assumption that Sunoco would prevail over Hoai in the PMPA case this made it difficult to respond. (Vol. I JA p. 510, lines 10-14) The memorandum opinion itself was taken almost exclusively from the dismissal brief of the Jones, Day defendants, who had filed no sanctions motion at that time.

Immediately upon announcing the summary judgment for Hoai in the PMPA case the court held a status conference during which the court below invited Sunoco to file a motion before trial to limit the scope of the damages which Hoai might obtain as a result of his summary judgment on the question of liability in the PMPA case. This was done despite the fact that the PMPA, at 15 U.S.C. 2805(d) specifies that actual damages will be consistent with the federal rules which only allow such motions after trial.

When in this civil rights case the plaintiffs filed a rule 60 motion for reconsideration the Jones, Day defendants, seeing how the court was viewing things, joined with another sanctions motion. The Sunoco defendants filed a further request for sanctions in which they urged the court to assess the counsel for plaintiffs millions of dollars for talking to a mem-

ber of the oil trade press who called them about this case. (Vol III JA, p. 1636) On February 1, 1991 the court below held a hearing on the show cause which was part of the order and memorandum opinion being appealed and announced, among other things, in connection with its consideration on what it was going to do about the sanctions motions against the plaintiffs and the show cause which it had issued, that "I want to get this done. What was it that General Powell said ?" (Vol. III JA p.1592, lines 22-33) This, we ask the Court to note, was only a few nights after General Colin Powell, the United States Chief of Staff of the Joint Chiefs, had announced to the entire nation, in response to a question about the Iraqi army in Kuwait, that he was going to cut that army off and kill it. The court below's invocation of this statement was in response to a comment by the attorney for

the Jones, Day defendants who was seeking extensive sanctions against the plaintiffs' counsel resulting from his joining in after the show cause was issued as part of the memorandum opinion and order appealed from.

On the same day that the lower court decided both the PMPA summary judgment in favor of the plaintiff Hoai and the dismissal against Hoai and his two fellow plaintiffs, the Hemenways, and issued the show cause against attorney Hemenway and plaintiffs' counsel, the court also held, in granting the summary judgment motion to Hoai in the PMPA case, that all of the numerous outstanding motions at that time in the PMPA case were moot, without even mentioning individually what the particular motions were. Among these motions was a quite mild sanctions motion that the plaintiff Hoai had filed after this Court's interim appellate decision in that

PMPA case. For even though this Court made it clear at that time that the constant Sunoco argument that these other proceedings which were never concluded were res judicata or constituted collateral estoppel were not valid and even though the court below had rejected those arguments, Sunoco kept refiling papers containing the res judicata and collateral estoppel arguments. (Vol. I JA para. 507-509) Plaintiff merely asked that the defendant Sunoco be stopped from such filing upon pain of more severe sanction if they continued. Thus while this sanctions motion, based on decisions of the courts, was improperly held moot, a show cause without specificity was issued against the two counsel carrying the litigation at virtually the drop of a motion that was to some degree made obsolete by the PMPA summary judgment in favor of Hoai.

It was in the record in the PMPA case, and the court below knew, that Mr. Hemenway was not being paid and it was obvious that counsel for plaintiffs in this case was carrying the litigation whereas counsel for Sunoco stated in the record that he had been paid several hundred thousand dollars by his client, Sunoco. Vol. III JA p. 1575, lines 1-3.

C. RELEVANT FACTS

Because of the procedural nature of the underlying facts, involving as they did the misuse of a court's procedure, the above descriptions have incorporated many of the relevant facts. To those already spelled out we add these: it is highly relevant that it is a matter of record in other proceedings in other courts, such as the Superior Court, that the testimony was given in the presence of the Sun executive in charge of oversight of the gas station franchise in question, who himself cor-

roborated it, that the plaintiff Haoi had been threatened with death and violence and had signed the "one dollar" contract, which, it can be observed, is an altered and fraudulent document on its face under such pressure.[3] Further, the Jones, Day defendants were at the hearing in the Superior Court where these things came out on the record and where David Hemenway and Hoai testified to the violence against them in the gas station leading to the broken settlement and the court proceed-

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[3]The "one dollar contract" document bears the notation at the bottom of the first page that that page is page 1 of 2. At the bottom of the second page it bears the annotation that that page, by contrast, is page 2 of 3. Page three bears no such bottom pagination notation at all. In his deposition which is in the record in the PMPA case, plaintiff Hoai testified that he only ever saw the third page when he was compelled to sign the "one dollar contract". It is, in other words, a fraudulent document and is so on its face so that for an attorney to rely on it and present it to a court as the defendants here did, is unethical in addition to being evidence of lack of good faith and malice.

ings that gave rise to the instant cause of action.

The facts leading to the development of the cause of action in the Superior Court were these: On April 10, 1986 the plaintiff Hoai opened the Sunoco station in question, at 2305 Pennsylvania Avenue, S.E., Washington, D.C., as a Sunoco franchisee. Plaintiff Hoai had come to this country in 1976, and, after initial training by Phillips Petroleum he had worked for several years within one of the Sunoco companies, rising to manage, as an in-house employee of Sun, some five stations in this area. In 1981 he had negotiated to buy the station in question from its then franchisee only to be told by Sunoco not to conclude the bargain because the then franchisee was a problem franchisee who would be out of the station in a while and that Hoai could get the franchise later from Sunoco directly. Hoai then

opened another Sunoco station in Greenbelt, Maryland which he switched over successfully from another brand and improved tremendously in its sales. Vol. III JA, para. 1121-1391.

He worked in some other businesses not involving a gas station but related still to autos, all with his in-laws, and then in 1986 applied for the franchise in question, which had come open as promised. He was told by Sunoco's representative, Ernest Peele, that he would need approximately seventy thousand dollars or so to start up the station. He had available at the time, again through his family, about half that. As part of an elaborate scheme Mr. Vo, who fraudulently posed as a wealthy construction magnate interested in helping a fellow Vietnamese with a friendly loan, promised that he would lend Mr. Hoai the other half of the needed capital while Vo's colleague Thach and several

others got Hoai's capital tied up in another business, which was to be run by Mrs. Hoai, an oriental specialty food business. The representation of Vo, Thach and the two other Vietnamese who perpetrated the scheme, was that the money put into the inventory of the food business could be fed back into the gas station as the food was sold and generated income, and, indeed, for a while that happened. In the meantime, Vo claimed to be putting up his thirty-five thousand dollar loan by taking control, without announcing it beforehand, of the gas station's bank account and claiming he had put the loan in the bank account. As it turned out all that Vo was doing was putting the station's own proceeds into the bank account of the station and claiming he had made a loan. In fact he had put a few hundred dollars in. All of the station's proceeds Vo then claimed was his money. Soon a

check for a load of Sunoco gasoline, the first one in fact, bounced.

At this point the plaintiff Hoai requested Vo and Thach to leave his station and told Vo and Thach that he would get money from his family to buy out whatever they had really put in. At that time Vo and Thach tried to extract from Mr. Hoai and his family hundreds of thousands of dollars on the false pretense that they had put that much money into the business. When Hoai balked he was threatened with murder and violence. His family was threatened as well. Soon Hoai found himself excluded from his station by such threats. Soon after that he found himself excluded by the ongoing threat, along with his wife, who was running it, from the food business. As a result some forty-nine thousand dollars worth of cash and credit that would have to be paid was lost in the seized inventory, all of the capi-

tal that Hoai was planning to use to generate income through his wife's running of the food business in order to feed money back into the gas station business as Vo's "loan" was used for the early stages of the start-up.

Soon, Ernest Peele, the Sun area representative, wondered why Hoai was not in his own station and inquired of Vo what was going on. Vo claimed the station was his, a position which Peele repudiated firmly. Hoai was, as a result, soon told by Sunoco that he had better get back in his station and get it back from Vo, or lose it. Hoai tried to get his station back, beginning in the last of May, 1986 and early June, 1986 through the offices of a Vietnamese attorney, who, unfortunately, he found out in August, was working with the gang of people who were causing his problems. In August he fired that attorney and got Mr. Hemenway to take

up his cause, initially pro bono. It was then, August 25, 1986, that Mr. Hemenway composed a document which was simply a notice to surrender the premises of the gas station to Mr. Hoai, the rightful franchisee, had Mr. Peele of Sunoco certify on the bottom of it that Mr. Hoai was the legitimate franchisee and entered the station with Mr. Hoai and his son, plaintiff/appellee David Hemenway. They asked the employees who were there to leave and they did. Vo was not there at the time. As it happened there was in the station when they entered an off-duty police officer and other, on-duty officers soon arrived. So that there were there the entire time police officers, all of whom either testified, entered stipulations or filed affidavits that all was

calm and that there was no violence.[4]

There soon was arrived at between one Arif, the attorney for Vo who came to the station on that day of the 25th of August, 1986, and Hoai and the Hemenways, a settlement agreement, whose existence and terms have been acknowledged by both sides in the record in the Superior Court proceeding. Under this settlement it was agreed that Hoai and the Hemenways, with others of their employ, would stay in the station that night and the next day Ernest

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[4]Despite this, Sunoco and Vo and their attorneys have, in every proceeding in this complex of litigation, appellate and trial level both, falsely asserted that Mr. Hemenway entered the gas station violently in some way. Sometimes they are just knowingly false assertions of violence, sometimes they are clumsy reverse racist implications based on physical size. Most recently, in the February 1, 1991 show cause hearing in this case, defendant Forester asserted that Mr. Hemenway had entered the station with a false court document. This, as an examination of the document shows, is a completely false representation. But this Court will be told similar falsehoods, it can rest assured.

Peele, the Sunoco representative, would state which of the two, as between Hoai and Vo, was the legitimate franchisee of Sunoco. If it was decided in favor of Hoai, then inventory would be jointly taken and Hoai would pay Vo for any moneys Vo and his friend and colleague Thach had actually put in to the business.

The next morning early, while David Hemenway and plaintiff Hoai were in the station after having spent the night, Vo and seven others came to the station, where David Hemenway and Hoai promptly locked themselves within the station building. Vo and the others brandished a knife and threatened to kill David Hemenway and Hoai and the latter two could hear the other Vietnamese trying to break into the building. David Hemenway, as is a matter of record, dialled 911, several times.

The police came and the other Vietnamese turned all smiles. Soon John Hemenway and also Ernest Peele of Sunoco came. Ernest Peele asserted firmly that Thanh Vong Hoai was the only legitimate frachisee of Sunoco. Vo and his attorney made a brief pretext of taking the inventory but, instead of keeping the settlement agreement, without notice they went and retained the Jones, Day defendants in this case, who then filed, on August 28, 1986 the pre-emptive strike law suit that led to the present cause of action, with both a complaint and a motion for a TRO. The complaint was based on common law theories of conversion and interference with contract. (Vol. I JA p. 138) It made no mention of the PMPA. Substantial damages were claimed against Sunoco as the lead defendant and against all three plaintiffs herein secondarily.

The first deprivation of federal rights under the color and authority of the regulations and customs of the D.C. court began with the arrangement of the TRO proceeding. The time for the TRO was blocked out a day ahead, but attorney Hemenway was not notified until an hour or so before the hearing time at which time he was invited to the hearing as if it were a normal counsel situation in which he was expected to represent his client. Instead, when he arrived, he was greeted with a motion to disqualify him as counsel for his client so that he might not even represent plaintiff Hoai in the TRO hearing. This motion was made under the color and authority of the canons of ethics which have been adopted as regulations of the District by the District of Columbia Court of Appeals. Although this sort of thing is not allowed in most courts in the country, that is, the use of "sandbagging"

tactics to deprive parties of counsel without notice in preliminary stages of proceedings, misuse of these canons in the Superior Court in those years was, unfortunately, sometimes accepted in the Superior Court, as it was in this instance. Hoai was thus deprived of his counsel of choosing, and counsel Hemenway of his right to associate with and represent his client.

Thus, new counsel, the present counsel now threatened with large sanctions, was brought in for a re-start of the TRO hearing at 8:30 the following morning. The TRO hearing began, but had scarce gotten into the opening statement of the Jones, Day defendants, representing Vo as the plaintiff in that proceeding, when the TRO judge interrupted to state that she did not want to hear about anything but the possibility of the local tort of "wrongful eviction" being committed by the

defendants. Under this doctrine of case law in the District, a landlord may not evict a tenant except through the regulations and procedures of the Landlord and Tenant branch of the Superior Court. There was nothing in the original complaint or TRO motion about this doctrine or any violation of it. Though the Jones, Day defendants herein, in prosecuting that case, did not initiate the use of this local law to deprive plaintiffs herein of their federal and other civil rights, once the suggestion was made, they embraced the concept, amended their complaint accordingly and embraced the idea that local landlord and tenant law pre-empted the PMPA rather than the other way around in matters of termination and nonrenewal of franchises. No mention of the PMPA was made in the initial proceedings and when it came into discussion through the efforts of the present plaintiffs and they

in fact removed the case to the federal court based on it; the present defendants combined to remand it to the Superior Court.

The TRO required, as a specifically expressed condition precedent, that a bond of $3,500.00 would have to be posted in cash. It was never posted during the duration of the TRO for its ten days of life. (Vol. II JA para. 1097-1102) Instead, the defendant Ottman promised the TRO judge he would give an attorney's check for the bond. Instead, under the customs of the Superior Court, Vo wrote an NSF check drawn on the account of Hoai's gas station franchise. By the time the check was returned to Vo under the procedures of the Superior Court, the TRO's ten days were long over. (Vol. II JA p. 1100) At that point the defendant Vo was required to post cash for a short while but then, under the practices of the Court,

the defendant Vo was allowed to withdraw the bond and take it back, thus providing no security whatsoever for the individuals whose property or rights are wrongly taken, enjoined, attached or interfered with.

Ten days after the TRO was issued, the defendants in this case approached the Judge in Chambers of the Superior Court who, under then Rule 12-I(b), a local rule of that court, was entrusted at that time to have presented to him at any time, ex parte as deemed appropriate, any other matters appropriate for such disposition. They presented to him and got him to sign a "consent order" purporting to be an "extension" of the TRO with lip service that it only applied to the defendants Sunoco and Vo which took the station away from Hoai and gave it to Vo for seven months, in violation of the PMPA. (Vol. II JA para. 85-87) This was on September 8,

1986. Absolutely no notice was given by any of the defendants to any of the plaintiffs prior to this misuse of the local rule and the plaintiffs were not notified until after the consent order had been signed and the judge's signature obtained. The present law suit ensued.

III. JURISDICTION

Jurisdiction is under 28 U.S.C. 1291. The lower court's jurisdiction is based upon the civil rights laws and 28 U.S.C. 1343, 1331 and 2201 and 2202.

IV. SUMMARY OF THE ARGUMENT

The use made of the Superior Court Rule 12-I(b) without any notice or due process to deprive the principal plaintiff of his valuable gas station franchise in a Lugar-like fashion violates 42 U.S.C. 1983. In addition to due process the PMPA rights and other civil rights are violated. Private attorneys are not privileged like prosecutors when they ex-

ceed their traditional role and participate knowingly and willfully in violations of due process and the like.

To take the station of plaintiff Hoai and harm his agents for having testified and attended a TRO by the procedure employed to avoid subsequent testimony at what should have been a follow on full preliminary injunction hearing violated 42 U.S.C. 1985(2) the first four sentences. 42 U.S.C. 1985(3) was violated by the favoring of an extortionist, gangster-type individual over his innocent prey where his prey, such as the plaintiff Hoai, are the minority group members. It is a denial of the equal access to the regular courts of justice, as opposed to the private justice of the thug, that all are entitled to enjoy. Likewise to prevent enforcement of the gas station franchise agreement in the court by the acts complained of violates 42 U.S.C. 1981 in-

asmuch as white people would not have been subjected to such treatment by Sunoco, which would not have thought it could get away with it. The same is true for leasing and holding property where a violation of 42 U.S.C. 1982 is involved. The conversion from dismissal motion to summary judgment was erroneously handled so as to bypass, improperly, the summary judgment safeguards, such as time to bring in additional material and fact statements under the local rule. This is particularly erroneous where outstanding motions to stay were ignored which clearly would have required a pause. A show cause for sanctions was used here in an improper and erroneous manner as part of the dismissal memorandum so as to chill advocacy in an unacceptable manner in light of pronouncements by the court and manipulation by opposing counsel in this and related litigation.

V. ARGUMENT

A. 42 U.S.C. 1983

In its decision in Lugar v Edmondson Oil Co., Inc. (1982) 457 US 922, 102 SCt 2744, 73 Led2d 482, the Supreme Court decided three points which appellants Hoai, Hemenway and Hemenway contend are decisive in their favor in this case. First, Lugar decided that a prejudgment attachment statute of a state that enables prejudgment attachment without due process creates a 42 U.S.C. 1983 cause of action and, second, that such a cause of action may be pursued by the injured party against the private parties who took advantage of the unconstitutional procedures to attach the property. Third, Lugar established that even where the wrongful attachment was ultimately proven to be wrongful under state law, the fact that it was possible and allowable under the state procedures before it was decided under

state procedures that it was wrong did not diminish the fact that it was violative of 42 U.S.C. 1983 when it was used early in the proceeding.

Here a very similar type of ability to go further than just an attachment and actually take a property consisting of a valuable franchise and the rights and interests attached to it was demonstrated. The private parties who perpetrated the actions were sued without suing the court officials involved in any way. The regulations and procedures and customs and practices of the Superior Court were used completely prematurely and without due process to achieve the taking of the property from Hoai and the giving of it to the defendant Vo. Thirdly, as in Lugar the plaintiffs have maintained, since 1986, in the Superior Court that what was done here was wrong under D.C. law as well as under federal law but, unlike in Lugar they have

not been able to get any results and indeed some judges of that court have reinforced the wrongs.

Thus, if anything, the case here for these plaintiffs is stronger than it was in Lugar.

We think it evident that when you take a man's property ex parte and completely without prior notice there is a deprivation of due process. It is a matter now of res judicata in the related PMPA case that the station franchise belonged to Hoai and not to Vo and that it belonged to Hoai and was illegally terminated and not renewed by defendant Sunoco so that to the extent that the other defendants engaged in the actions of Sunoco, or joined in them, as those actions violated the PMPA then the plaintiff Hoai, and the other plaintiffs as his agents, were deprived of an important and valuable statutory right

under color and authority of District of Columbia law.

Further, the Superior Court is an Article I federal court. Therefore, since Hoai and the Hemenways appeared at the TRO hearing and testified and attended as parties and witnesses, to the extent that the gas station franchise was property of the plaintiff Hoai, in which the other two had an interest derivatively, and the defendants injured him in that property for the plaintiffs having testified as to the violence by taking it away from him in a manner that would risk no further such testimony, i.e., by proceeding ex parte, then important rights under 42 U.S.C. 1985(2), the first four sentences, were also deprived under the color and authority of the regulations, customs and practices of the Superior Court.

The bond procedure which provides completely illusory security violates due process.

The other federal rights violated which involve equal protection and intentional discrimination based on an invidious classification, will be discussed in their own context further on.

An attorney, such as plaintiff John Hemenway and a client, such as plaintiff Thanh Vong Hoai, have associational rights, particularly where Mr. Hemenway is helping Mr. Hoai pro bono, as was the initial case here. In Re Primus (1978) 436 US 412, 56 Led2d 417, 98 SCt 1893. They were violated here. Further, an act of using a law suit to seek redress, even as a defendant and counterplaintiff, is a first amendment right to seek redress by petitioning the court. City of Long Beach v Bozek (1982) 31 Cal 3d 527, 183 Cal Rptr 86, 645 P2d 137.

B. ATTORNEYS AS PARTIES

A side issue continually raised by these defendants is that the attorneys involved were merely acting in their normal course as attorneys and therefore cannot be liable under 42 U.S.C. 1983. There does not seem to be any Supreme Court case directly on point and there are many cases on the point that attorneys do not become state actors merely because they are officers of the court. But that is a chimera. There was never any contention here that private attorneys merely because they are officers of the court are, ipso facto, state actors so as to be liable under 42 U.S.C. 1983. Nor was there any contention that by employing the ordinary, constitutional processes of a court in a manner that does not violate federal law, private attorneys incur 42 U.S.C. 1983 liability.

The contention here is simply that as a factual matter the defendant attorneys knew perfectly well that what they were doing violated basic constitutional safeguards and should have known that it violated the PMPA rights of Hoai and his agents. Further, it is alleged that they did it maliciously and willfully which plaintiffs fully believe is shown by some of the facts set out above and others that can be proven. They do not have the qualified immunity that the common law gives to prosecutors.

It is quite clear that the Edmondson Oil attorneys in Lugar would have been as liable as their clients for the 42 U.S.C. 1983 violation. That is so under familiar principles of agency. Here, however, the attorneys involved went further. After all the D.C. Court had a pre-judgment attachment procedure, under Rule 64-I and

D.C. statutes that is properly used for such attachments and is surrounded and requires quite a sustantial bond. But these attorneys searched and connived to find rules and procedures of the court to bypass the safeguards of that rule and of Rule 65 which, like the federal law, requires a full hearing before a preliminary injunction can be issued.

Prosecutors had immunity at common law. The Supreme Court has held that a prosecutor enjoys absolute immunity from suits for damages under 42 U.S.C. 1983 when he or she acts toward initiating a prosecution and in presenting the state's case. Imbler v Patchman (1976) 424 US 409; 96 SCt 984, 47 Led2d 128. There is no record that a similar immunity extends to private counsel. Avoiding giving opponents and their clients the elementary notice required by due process is not the

normal function of an attorney acting in a private capacity.

C. 42 U.S.C. 1985(2)

The Superior Court is an Article I federal court. The first four sentences of 42 U.S.C. 1985(2) create liability for parties who injure a party or witness for having attended or testified in a federal court. No racial or otherwise invidiously discriminatory intent is required. Here the plaintiffs attended the TRO hearing and testified freely and fully as parties. Defendant Vo sat there and declined to testify to counter the uncontested testimony of the plaintiffs concerning the threats and attempts of violence by the defendant Vo. Plaintiff Hoai and plaintiffs Hemenway, as defendants in that proceeding, were promised twice by the TRO judge that there would be a full follow-on preliminary injunction in ten days. Obviously at that hearing there would have

been further testimony by the present plaintiffs on these matters of violence and threats of violence.

Obviously not wanting such testimony and in order to retaliate against the plaintiffs for having so testified, the defendants devised a way to harm plaintiff Hoai in his property, and also to harm his agents, by taking that property from him in violation of federal law.

D. 42 U.S.C. 1985(3)

Vo, along with others, was threatening the plaintiff Hoai with classical strong arm tactics and was, therefore, trying to be the law as far as Hoai was concerned, attempting to instill in him sufficient fear and deprive him of income to the point where he could not have effective equal access to the law to protect himself and rectify his plight. The other defendants in this case knew that this was going on and yet they joined with Vo and

gave him Hoai's gas station franchise, knowing that it would enable the rule of the strong arm by Vo over Hoai and the private alleged system of justice that such strong arm figures purport to dispense. In doing so they were fully aware that they were depriving Hoai of the ability to have a cash flow from his own business which would have given him the ability to fight Vo and Vo's tactics. This was their intent in fact as they carried out their conspiracy. They wanted to crush the plaintiff Hoai so that they then would be free to not have to face any possible restitution for their activities. They had observed that Vo was only interested in preying on other Vietnamese. Under this situation the other defendants' choosing Vo as a co-conspirator on the theory of "let them settle it among themselves", a theory which Sunoco fully admits in the record it was pursuing,

amounted to little more than a cynical calculation based on an estimate that members of the Vietnamese race could not obtain redress against the desires of such a strong-arm figure in their own community, a judgment in which the righteous Vietnamese are perceived as not worthy of receiving the justice and the equal protection of the laws of the overall American society. Instead, they are to be put at the mercy of such "justice" as the brigands within their community represent. Hoai in standing up against Vo and his colleagues, and the Hemenways in helping Hoai, are discriminated against invidously for racial reasons as much as those indefatigable plaintiffs in Hobson v Wilson (CA DC 1985) 737 F2d 1, cert den. 470 US 1084. Neither Sammy Abbot or Abe Bloom, for example, were black and neither of those gentleman was purely involved in assisting against minority discrimination.

Sammy Abbot was primarily involved in battling freeways, which had racial overtones and implications. Abe Bloom was against the Vietnam War which he thought had a racial component.

The famous language of Griffin v Breckenridge (1971) 403 US 88, 91 SCt 1790, is that the language of 1985(3) requires, "as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amdendment." (emphasis added). 403 US at 102. Here Vo, acting in a classic strong arm manner, sought to prey on his fellow Vietnamese and block his access to an effective remedy for the wrong Vo was doing him. "The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law by all." Id. at 102. Here the law secures to all of those of us who are not subject to such

predators within a relatively isolated ethnic group all of our rights. The aim of Vo clearly was that Hoai, as a righteous member of the Vietnamese community should not have equal enjoyment of those rights available to all of the larger community. The others joined in this by what they did. There is here a class-based invidiously discriminatory animus and it has a racial element that is not economic but rather grows out of a desire by Vo and his fellows to control and dominate their fellow ethnics of the Vietnamese community.

E. 42 U.S.C. 1981

What plaintiff Hoai and his two agents were doing in the Superior Court was seeking to enforce the franchise contract which the plaintiff Hoai had with Sunoco. Because of its choosing, however, to go with the strong-arm regime of Vo and give him the gas station franchise in violation

of the franchise agreement, Sunoco, and the others with it, were depriving Hoai of the right to enforce his contract, to give evidence, to be a party and to the full and equal benefit of all laws and proceedings for the security of his property as is enjoyed by white persons.

F. 42 U.S.C. 1982

Nor did the defendant Vo, and the other defendants with him, give Hoai the same right as is enjoyed by white citizens to lease and hold the franchise relationship, agreement and lease in this instance. Vo cut him off from this right because he thought that Hoai, as a Vietnamese, could be treated in this way and the larger, "white" world could not be reached by Hoai for assistance. The others joined with this conspiracy.

G. THE CONVERSION TO SUMMARY JUDGMENT

In this case the dismissal motion of the Jones, Day defendants including

several affidavits and contained much material from outside the record. The dismissal motion of the Sunoco defendants referred to matters outside of the record. In its opinion the court spoke of dismissing the case under Rule 12(b)(6) but in fact considered and entertained materials from outside the record.

Thus this was a summary judgment, not a dismissal. Under the circumstances here: no notice whatsoever of the conversion, a failure to allow any idea of an amendment to allow the actual underlying causes and factual issues to be brought out, this particular conversion does not meet the fairness test set out in Tele-Communications of Key West, Inc. v United States 1 Fed Rul Serv 3d 960, 756 F2d 1330 (CA DC 1985).

Even more unfairly, plaintiffs had moved for stays pending the outcome of plaintiff Hoai's summary judgment in the

related PMPA case. Obviously the intent of these motions was to allow a decent interval after the decision in it that the effects of that opinion could then be absorbed into the civil rights case proceedings in order that the effect in particular of it being found that the defendant Vo had absolutely no right to claim the gas station franchise which lack of any right is a necessary concommitant or inescapable corollary to the finding that Sunoco terminated and nonrenewed Hoai's franchise illegally by virtue of the consent agreement.

Although there are situations perhaps where short notice of the conversion is adequate, here there was none at all. The strict rule of this Circuit concerning the filing of specific statements of facts that the movant alleges are uncontested with the responding statement of allegedly contested facts under Local rule 108(h)

was ignored here. See Gardels v Central Intelligence Agency (CA DC 1987) 637 f2D 770; Tarpley v Greene (CA DC 1982) 684 F2d 1.

It is clearly as if the lower court did not want the full facts considered properly and no chance for amendment.

Rule 12(b) specifically requires that where the Rule 12(b)(6) motion matters outside the pleadings are presented to and not excluded by the court, then it is mandatory that the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Rule 56 (c) then provides for a hearing after 10 days notice at least.

Under the 1946 amendments to the Federal Rules the committee notes stated of this conversion from Rule 12(b)(6) motions

to Rule 56 motions: "It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties will be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking party by surprise through the conversion of the motion into a motion for summary judgment." Thus the spirit and letter of the rules were ignored here.

H. CHILLING WITH THE SHOW CAUSE

The combination of factors in this case show that there is certainly an appearance that Rule 11 is not being invoked here for the purpose for which it was principally intended, i.e., the deterrence of the filing of papers in the court without having done adequate pre-filing inquiry. That is the primary purpose of the Rule. See Cooter & Gell v Hartmarx Corp. (1990) 110 SCt 2447, 2554. Yet,

here, plaintiffs counsel was limited in the court order ordering the show cause, the one appealed from here, to 45 pages. Then, at the subsequent oral hearing plaintiff's counsel sought to get his pre-filing inquiry into the record he was cut off from doing so by the court below.

Here, the pre-filing factual inquiry involved hours of investigation over many years, the key happenings are matters of public record which the counsel were familiar with, and the legal inquiry went to the cases cited herein and the law. There is no 1985(2) case like this one, no 1985(3) case and no such case under either 1981 or 1982. There are, however, no cases excluding what is sought here.

We think it evident that what was filed here was not subject for Rule 11 sanctions. The underlying facts and law here justified filing a complaint. The complaint was clumsily drafted. However,

as Judge Posner has pointed out, the Rule's purpose is not to penalize for inartful draftsmanship. In re Kelly (CA7 1986) 808 F2d 549, 552. The parties plaintiff, for reasons already discussed, anticipated that there would be an opportunity for submission of additional materials and amending the complaint accordingly because of the pending decision in the PMPA suit. That did not occur, of course. Instead the actions of the court below indicate that it either simply forgot about the outstanding stay motions to allow for such further work after the PMPA decision,[5] or its intention was to shape the litigation up by employing the show cause as a tool for that purpose. The chilling impact of the court's actions

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[5]Some credence is given to this possibility by the fact that at the February 1, 1991 hearing in this case the court below, at the outset, listed those motions as still outstanding and they have never, in fact, been ruled upon.

on plaintiffs and their counsel, objectively considered, is the same whichever it was, inadvertancy or conscious use of the rule and a show cause to shape the litigation up for purposes of calendar efficiency. The objective appearance is one of the lower court's granting a begrudging summary judgment in the PMPA case but immediately seeking to have the damages cut to a meaningless figure in that suit, while simultaneously using the unspecified show cause as part of the opinion appealed from here to chill any possibility that the plaintiffs in this case might continue to carry their case forward by threatening their counsel with a show cause (one of whom is pro se in the matter) and putting them to the burden of spending what time they could put in on the case defending themselves under difficult conditions.

Objectively considered, it does not seem that the reference at the February 1,

1991 hearing on this show cause to General Powell could refer to anything other than the general's famous remark, then just made and heard round the world, that he was going to surround, cut-off and kill the Iraqi army, just what he has done. Since there are no countersuits here, this remark can have only been aimed at the suits of the plaintiffs here. Rule 11 is intended to deter baseless filings according to the Supreme Court as cited above, not to cut-off, surround and kill litigation. Therefore, here the inclusion of the vague and unspecified and even confusing show cause in the appealable final order is itself appealable as part of that order, for the show cause is integral with the dismissal, is completely undifferentiated from it and establishes an effect which is absolutely chilling. Indeed it made counsel have to really go to great additional risk merely to file a

normal reconsideration motion, even though they felt they had solid grounds for doing so.

In a case from the ninth circuit, Judge J. Blaine Anderson criticized the use of the technique of imposing sanctions without notice and proper hearing pursuant to Rule 11 in inappropriate circumstances, using as an example a district court case from this circuit. Tom Growney Equip. v Shelley Irr. Development (CA9 1987) 834 F2d 833, 836. Criticizing Judge Green's decision in Rowland v Fayed (D DC 1987) 115 FRD 605, 608, Judge Anderson pointed out some of the dangers of not giving proper notice under Rule 11. We hasten to add that this is not a case such as Rowland where sanctions were imposed without notice. But we do point out Judge Anderson's observation at 836 on the lack of specification of the grounds of the Rule 11 show cause issued here. Judge

Anderson points out in that case that the appellate panel was "hard pressed, as we assume appellant must have been, to determine specifically, either before or during the subsequent hearing, the grounds on which the district court was relying...." Here there was no hasty imposition of sanctions without proper notice but there was a blanket show cause without any specification whatsoever, with a trigger of a little over two weeks and a page limit of 45 pages imposed by the order to explain that which was never specified.

In the complex of litigation surrounding Mr. Hoai's problems counsel have spent hundreds and hundreds of hours of legal research and factual investigation over a period of a number of years, all of which could qualify as pre-filing inquiry. When counsel tried to present this pre-filing inquiry at the February 1, 1991 hearing, as we have pointed out, counsel were cut

off, even though counsel pointed out that under one of the two second circuit cases most frequently cited in this circuit, prior work with the client counts as pre-filing inquiry so long as it lends itself to assuring a well-grounded and warranted filing. When we speak of fairness here, we stand on the decision by the Supreme Court in White v New Hampshire Department of Employment Security (1982) 455 US 445, 71 Led2d 325. Just as a fee motion in a civil rights case should not unfairly surprise or prejudice the party from whom the fee is sought we think the same applies in the court's use of Rule 11 show cause orders as part of dismissal grants.

Two second circuit cases are much cited in the cases in this jurisdiction on Rule 11. One that is particularly pertinent to the question of pre-filing inquiry is Oliveri v Thompson (CA2 1986) 803 F2d 1265. It also involved a civil

rights and one also that concerned abuse of authority, though in that case it was of police arresting procedures. In that case it was held that the attorney's experience and investigation, coupled with the client's story, was sufficient to justify bringing the case without it being sanctionable. Id. at 1278. Indeed the case here is much stronger than in Oliveri. For, in that case it was the client of the attorney against whom the sanctions were sought who proved out to be untruthful. In the Hoai litigation it has turned out that every time the plaintiffs have been allowed discovery they have been able to show that it is Mr. Vo who is not being accurate and, somewhat derivatively, Sunoco. As in that case also there are great difficulties in obtaining some information. Information about the Vietnamese plaintiff Hoai is standing up against is hard to come by for the simple

reason that many of the people with the information are reluctant to talk and others will not talk except privately but will not speak up in court. Some witnesses are now dead; one died and admitting while approaching death that he had been intimidated into changing his story. We point out to this Court that the standard set out in Oliveri is that "the court is to avoid hindsight and all doubt is to be resolved in favor of the signer. As we stated in Eastway, Rule 11 is violated only when it is 'patently clear that a claim has absolutely no chance of success.' 762 F.2d at 254." This circuit, we note, does not appear to have such a standard enunciated. But it is clear in this case that if there had been proper conversion of the dismissal motion, proper time to digest and apply the PMPA decision, and proper opportunity to look at the facts and amend, it would have been

readily apparent that the Lugar decision alone makes it clear that it is not the case that a the civil rights claims of these plaintiffs have absolutely no chance of success. As said in Eastway, the other second circuit case often cited in our jurisdiction, at the place cited:

> In framing this standard, we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer. But where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated. Such a construction serves only those who would manipulate the federal court system for ends inimicable to those for which it was created.

There is not the slightest assertion that this standard was not met here other than assertions of opposing counsel which do not turn out to be so when investigated.

What is particularly disturbing here is that the rule, objectively considered, is being used not to stop manipulation of the federal court system, but to assist the other side in doing just that, particularly the defendant Sunoco.

After this Court rendered its interim appellate decision in the PMPA suit, cited above, that became evident. For that intermediate appeal was necessitated by a motion made by Sunoco in that related case on February 9, 1988, cutting off the discovery of the plaintiff Hoai in that case before the scheduled date. This motion to dismiss the PMPA case was based entirely on arguments of collateral estoppel and res judicata, issue preclusion in other words. The motion was, as was later noted

in oral argument before this Court, weak and vague in its reasoning. It was denied without comment by the court below. It was at that time that the lower court in that case sua sponte stayed its proceedings on a theory of abstention, attempting to compel plaintiff Hoai to pursue his remedies in the Superior Court of the District, where he had not been the initiating party. When the intermediate appeal of that stay came up to this Court on the occasion cited, the record reveals that these same arguments of issue preclusion were tried repeatedly on the panel of this Court, so repetitively in fact that the panel had to remonstrate with the counsel for Sunoco several times that the issue preclusion arguments were not valid, at first politely and then more firmly.

Nonetheless, upon remand, the counsel for Sunoco continued to file motions and other papers with the Court in which he

continued to raise issue preclusion arguments. For instance, in its opposition to the summary judgment motion of the plaintiff Hoai in that case, a motion now granted, which was filed on April 7, 1989 the counsel for Sunoco filed some 15 attachments. One of them, as on numerous prior occasions (in fact every time he can get it in) was a copy of the TRO order of the judge in the Superior Court and it was accompanied by further issue preclusion arguments that the TRO was res judicata. Keep in mind that this was not only after the lower court had rejected this argument without comment and this Court had rejected it, but also after the District of Columbia Court of Appeals had rejected it. All the more remarkably, before most courts assertions that a TRO is res judicata and provides a collateral judicial estoppel would themselves be sanctionable.

Finally, on October 26, 1989 counsel for plaintiff Hoai in that case moved for sanctions for the continual misrepresentations to the court, including particularly the misrepresentation that the matters had already been decided in other forums because of such things as the long expired TRO in the Superior Court. This motion was never ruled upon by the court below until the October 1, 1990 date of the simultaneous opinions and decisions dismissing plaintiffs' complaint in this case and granting Hoai's summary judgment motion in the PMPA case. At that time, as part of the PMPA opinion granting Hoai summary judgment on liability all outstanding motions were denied as moot.[6] This, of course, was simultaneous with the issuance of the show cause in this case against

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[6]The opinion of the Supreme Court in Cooter & Gell, supra indicates that this would not be a correct decision though not directly on point.

counsel for plaintiffs, one of whom is also pro se. As the transcript shows, at the hearing on the show cause, on February 1, 1991 in this case, the counsel for Sunoco, echoed again by the counsel for Vo, repeated these same issue preclusion arguments again and again. In fact, the most prominent assertion, the record shows, of Sunoco counsel, was that "this litigation", without distinction between its various branches, must be stopped. The assertion was made repetitively that plaintiffs were bringing the same action over and over again and it had already all been decided. This is an untrue statement. No decision has been made on any suit against the present defendants except for the PMPA decision against Sunoco of partial summary judgment. No decision has been made against plaintiff Hoai except that his RICO suit, naming only Vo among these defendants, was dismissed in the

Eastern District of Virginia for an alleged lack of a pattern of racketeering activity, a technical requirement under that Act, before the Supreme Court struck down such use of that criteria to dismiss RICO suits in the summer of 1989 in the HJ, Inc. case.

Thus it can be seen that, despite losing on a baseless theory repeatedly, a theory that should have been sanctionable in the first instance, counsel for Sunoco, by virtue of simply ignoring pronouncements and holdings denying his issue preclusion argument, has simply kept making it and is succeeding in getting the court below to attack opposing counsel rather than himself. For whatever reason, he has succeeded with this tactic in persuading the court below, as part of this dismissal presently appealed, to chill the advocacy of plaintiffs' counsel and conceive of the litigation of the plaintiffs as being lit-

igation which ought to be treated like General Powell said he was going to treat Saddam Hussein's army. This, we suggest, is the manipulation of the federal courts warned of in Eastway, supra. And, for whatever reason, because of the lower court's fascination with General Powell, perhaps, or because of simple persistence, the manipulation has worked and is chilling the cause of the plaintiffs improperly. Therefore we ask this Court to consider this show cause as an integral part of the error in this dismissal order appealed from.

The Supreme Court, in its opinion in Browning-Ferris Industries, Inc. v Kelco Disposal, Inc. (1989) 109 SCt 2902, decided that the excessive fines clause of the Eighth amendment does not apply to curtail private jury awards deemed excessive by those suffering from them. The Court traced the history of that clause to

the amercements under the English Kings that were used to fine one party and control litigation by a sort of favoritism. To the extent that the court below itself participates in a one-sided policy that distorts the purpose of Rule 11 amercement may be what is being approached here.

CONCLUSION

The dismissal should be reversed and the cause remanded with instructions to allow a complete amendment of the complaint in light of the decision in the related case and any other relevant matters, after which a full briefing on summary judgment motions should be allowed only with all requisite safeguards and precautions to assure that there is no material factual dispute.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by U.S. mail, first class, postage prepaid, a true and accurate copy of the foregoing Brief this 27th day of February, 1991, upon the following: J. Gordon Forester, Jr., Greenstein, DeLorme & Luchs, Suite 300, 1220 19th Street, NW, Washington, D.C. 20036-2400; Robert Pleshaw, 729 15th Street, NW, Washington, DC 20005; Francis X. Markey, Jones, Day, Reavis & Pogue, 1450 G Street, NW, Washington, D.C. 20005.

John D. Hemenway

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Oral Argument scheduled for
May 13, 1991, 9:30 am

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

RECORD NO. 90-7170

THANH VONG HOAI, et al.,

Appellants,

THANH VAN VO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS THANH VONG HOAI, DAVID HEMENWAY AND JOHN HEMENWAY

REPLYING TO

BRIEF FOR APPELLEES JONES, DAY, REAVIS & POGUE, MILLARD F. OTTMAN, JR. and DAVID C. ROSEMAN

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April 12, 1991

April 12, 1991

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,	)	
Appellants,	)	
v.	)	USCA Number: 90-7170
THANH VAN VO, et al.,	)	
Appellees.	)	

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United States v. El Paso Natural Gas Co., (1964) 376 US 651 — 3

Wilder v. Virginia Hospital Assn., (1990) 496 US ___, 110 L.Ed. 2d 455 — 11,12

Wright v. Roanoke Redevelopment and Housing Authority, (1987) 479 US 418 — 11

I. REPLY TO JONES, DAY OPPOSITION TO 42 U.S.C. 1983 CLAIMS

The opposition of the Jones, Day defendants (Roseman, Ottman, and the law firm itself, hereinafter, collectively "J/D") is more careful and articulate than that of Sun. J/D asserts that there are "substantive" "basic defects, which cannot be cured by amendment." Opp., p. 16. They then assert that there is a "heightened pleading standard" that has not been met. Id. In the end, their 1983 arguments, though more articulate and replete with many more citations, differ in some respect from from Sun's, but not so much as first meets the eye.

One argument J/D does not explain well at all is how, if a heightened pleading standard has not been met, there cannot be a cure by amendment of the alleged deficiencies in pleading. As has been pointed out in the reply to Sun's opposi-

tion, there was a great effort by the court below not to allow amendment. In this situation it is hard to see how J/D can be so certain that the alleged defective pleading cannot be cured. Further, J/D, in its motion to dismiss filed a number of affidavits and more than 300 pages of exhibits. (JA 78-400) Because that material was not excluded from the record and was looked to by the court below which referred to the material five times in its Memorandum decision (JA957) the motion was converted to one for summary judgment. Plaintiffs, having made motions to stay (JA1410 and JA1455) making clear that they expected further opportunity to deal with the motions to dismiss after the overlapping summary judgment decision then pending in the PMPA case,[1] motions which the court below appears to have simply ig-

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[1]See Section II in the reply to Sun's opposition.

nored, expected to submit countering materials and amend after the decision in the PMPA case, an opportunity plaintiffs were denied. Under these circumstances we do not think it is the case that amendment could not have cured any alleged defects. Certainly it is the case that it would be impossible to tell whether that is so with regard to the alleged failure to meet a "heightened pleading standard." If the failure is indeed one of not pleading enough detail and being conclusory then it would seem conclusory to assert that the defect could not be cured by following the normal course of allowing at least one amendment to fill in the allegedly missing allegations needed to support the conclusory assertions.

This would seem particularly important here where the record below shows the lower court adopted, almost without change, the findings and conclusions of

the J/D defendants as its own findings and conclusions, without any appearance of independent analysis (Memorandum Decision, JA956-963). Virtually the only change the court below made was to add the show cause in its effort to chill the advocacy of the plaintiffs and their counsel. (JA955) Up to this time, only Sun had filed a motion for sanctions. (JA932-951) J/D filed its Motion to "join" Sun in requesting sanctions on November 15, 1990, six weeks after J. Oberdorfer issued his "show cause." (JA991-1002). And this show cause did not contain any independent analysis apart from that submitted by J/D in the earlier filing. In effect it asked the plaintiffs and their counsel to show cause why they should not be sanctioned for daring to depart, in an unspecified manner, from that which was advocated by J/D. This Court has pointed out that it requires that a lower court's findings

enable it to discern the lower court's chain of reasoning. Afshar v Department of State (CA DC 1983) 702 F2d 1125, 1144, citing Schwartz v IRS (CA DC 1975). It cannot be said that there was any independent analysis here. The lower court simply incorporated the language of the J/D brief into its opinion and added the chilling show cause without additional explanation or reasoning. Little wonder that J/DS was encouraged then to file its own Rule 11 motion. This is not just a case of adopting findings of facts and conclusions of law supplied by J/D. This is a case of taking the J/D brief and using it virtually as the lower court's opinion. In Afshar this Court noted that such a practice is not to be rejected out of hand (United States v El Paso Natural Gas Co. (1964) 376 US 651, 656, 84 SCt 1044, 1047, 12 Led2d 12) but noted that it is:

> rarely the best approach because it tends to undermine the functions of such findings in aiding the trial court's own decisionmaking process and revealing that process to the reviewing court,...

The Court then noted that it will adopt the findings lacking such independent analysis if they are supported by the evidence. Here it would seem that the lower court was anxious to see that the evidence (of amendment, e.g.) would not be available to support its adoption of the J/D findings and conclusions without independent analysis. Under the circumstances this would <u>not</u> seem to be one of the rare cases where allowing parties on one side to thus determine the findings of fact and conclusions of law was appropriate. Indeed, it seems as if the lower court did not want this Court to be able to discern either its chain of reasoning or whether the findings and conclusions it accepted from Jones, Day were supported or not. Fortunately for the plaintiffs, such

things as Rule 12-I(b) of the Superior Court as it existed on September 8, 1986 (JA1674) are a matter of which any court may take notice and as such the disparity between the findings and conclusions submitted by J/D and adopted by the lower court without independent analysis and the lack of facial constitutionality of that rule's provisions for virtually unfettered ex parte decisionmaking are apparent despite this effort by the lwoer court. The rule was changed on 1/1/91 (JA1675).

Substantively, J/D urges that it shows in opposition that plaintiffs have not pled and proved that the defendants either deprived them of a right guaranteed by the federal laws and Constitution or did so under color and authority of the regulations and practices of the District. As to the later proposi-tion, J/D "proves it" by going back to Adickes v S. H. Kress & Co. (1970) 398 US 144, 152 and then coming

obliquely forward to Lugar v Edmondson Oil Co. (1982) 457 US 922. We reply that this is misleading. While the opinion in Adickes left room for doubt as to whether or not an active conspiracy with, or joint participation with, state officials was required, Lugar and many other 1983 cases since Adickes (now over 20 years old) have made it clear that usage of a state policy embodied in some rule or practice is sufficient to create the requisite color and authority of state law. Indeed the very point of Lugar was that the judge and the sheriffs were not sued, only the private users of the attachment procedure. There is not the slightest hint that the Sheriff and his deputies were in conspiracy with Edmondson Oil and unsuccessful defendants. Moreover, as here, the defendants in that case were alleged to have violated state as well as federal law. It was ultimately found by the state court itself in Lugar

that the pre-judgment attachment itself was not lawful under Virginia law and it was dissolved, but the damages remained.[2] The question remains one of whether this case comes under Lugar and J/D has not shown that no set of facts can be proven which would bring it under that caseholding on the point of acting under color and authority of D.C. law. The assertions that this Court earlier found that the agreement of the Superior Court consent order was purely a private agreement do not alter that picture for reasons given in the reply to Sun. It took years of effort for the plaintiffs to get to this Court and have that fact pronounced. Before that Sun and J/D, from sometime before September 8, 1986 on pretended to all and sundry that the consent order was a

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[2]For more on this point see the extensive reply to the similar point made by Sun in plaintiffs' reply brief to Sun's opposition, part I.

court order that must be obeyed as such. Their conversion comes too late. What is at issue is not what the consent order was ultimately found to be by this Court but rather what the defendants, including J/D acted under. That is the language of the statute.

II. SUPERIOR COURT RULE 12-I(b) AND DUE PROCESS

This brings us to the ingenious argument in this opposition concerning Superior Court Rule 12-I(b) as in effect at the time. Unlike Sun, J/D acknowledges the rule and the oblique reference to it even in the original complaint. However the J/D argument is that because the rule was so broad and vague it is not facially unconstitutional but is rather "neutral". Opp. pp. 20-21, 32-34. In support of this contention J/D seeks to steer the Court away from Lugar and to analogize this case directly instead to Jackson v Metropolitan Edison Co. (1974) 419 US 345, 355-57. In

Adickes the situation of the conspiracy alleged between the white employees of the Mississippi dime store lunch counter and the Hattiesburg police in and near the restaurant did not resemble the present situation where no conspiracy is alleged or relied upon. Similarly the Jackson analogy is inapt. In Jackson it was not an arm of the state, such as here its judiciary, that was involved, but rather a privately owned utility company. It is hard to see how the two things are analogous. The decision in Jackson specifically turned on the privately owned status of the utility. Lugar, on the other hand, as in this case, specifically concerns the use of the procedures of a state court as set by law. The use of Jackson here muddies rather than clarifies the waters. Nor does it stand for the proposition advocated by J/D that there is some kind of distinction between a govern-

ment entities having regulations that merely allow unconstitutional usage of the state's authority and are thus allegedly "neutral" and such regulations that positively mandate unconstitutional behavior. The procedure found unconstitutional in Lugar did not force Edmondson Oil to use it. Edmondson Oil chose to use the state procedure when it should have realized that it violated due process. Similarly, defendants here chose to use Rule 12-I(b) for the purposes of seizure of Hoai's franchise and damage to his property before judgment.[3] They obviously chose to use Rule 12-I(b) as it then existed in or-

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[3]Jones, Day's inclusion of Superior Court Rule 64-I at p. 2 and its attempted use of that rule here are misleading and irrelevant. Defendants did not even attempt to use that rule and it is not in issue. If they had so attempted, as we have pointed out in the reply to Sun they would have run into the pre-judgment attachment statute which it is pursuant to. That statute has narrowly prescribed safeguards which would have prevented what happened here.

der to avoid those safeguards as well as the safeguards of Rule 65. As we have pointed out in our reply to Sun, we do not think the proscription of Lugar can so easily be evaded. Obviously the Superior Court itself has realized the dangerous nature of the overbroadness of the rule as it then existed, because in the amendments to the Rule effective January 1, 1991 it eliminated the dangerously unconstitutional ex parte provisions and added the kind of specific safeguards contained in the attachment before judgment statute. (JA1675)

As to the contentions of J/D that there is no deprivation of federal rights here:[4]

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[4]Since Jones, Day did submit so much outside material with its Rule 12(b)(6) motion, thereby converting it into one for summary judgment, the real issue is not as Jones, Day and the lower court have expressed it, one of whether plaintiffs properly alleged a deprivation of federal rights but rather if there is any indication that the same actually occurred, even if the court below was partially successful in obscuring that possibility.

This is a somewhat incredible argument. Surely attorneys in one of the largest law firms in the country know quite well that when they seek out a loophole like then Superior Court Rule 12-I(b) so as to invoke the power of the court and at the same time avoid having to give the party who owns the franchise in question notice, they are violating that most fundamental federal constitutional right - due process, which, in the case of the district, is protected by the Fifth Amendment. Plentiful facts are alleged to show this violation and the complaint, (JA01-21) inartful as it may have been, alleges the due process violation in paragraph 7 (JA03) and in Count One paragraphs 43, 45 and 46. (JA17-18) In those paragraphs there is certainly an allegation of the First Amendment right to petition for redress being violated and there are sufficient facts alleged to show that by this

is clearly meant both the deprivation of Hoai's counsel of choice and of Hemenway's right to represent his client and press that client's petition for redress through the Courts without the use by defendants of the improper practice then obtaining in the Superior Court by which Judge's eliminated counsel without meaningful analysis on all sorts of pretexts. This was accomplished under color and authority of the canon in App. 4 adopted by the Court of Appeals, D.C. Code 1981 Ed. (Michie's) Rules, Vol. 1, p. 183.

Since Lugar clearly does establish the state action in this kind of use of state procedures to take or attach the property of others before judgment it is also clear that there is (because it is the D.C.) a Fifth Amendment equal protection violation here. It is hard to think of any more invidious classification than siding knowingly with criminals against their

victims and seeing that the processes of the state ensure the preference for the former over the latter.

We turn to the astounding claims concerning the violations of the PMPA rights of the plaintiffs, arguments rejected by the Supreme Court. The J/D argument on this topic seeks to confuse the Court into accepting that because, under paragraph 29 of the complaint the plaintiffs allege that Hoai has sued separately under the PMPA he does not sue for deprivation of his rights under it here.[5] The two things are not the same. It is one thing for a franchisee to sue the franchisor under the specific procedures of 15 U.S.C. 2801 et seq., namely 15 U.S.C. 2805(d) and another for that franchisee to sue the franchisor and others for violation of his civil rights. There is nothing in the PMPA in-

[5]The Hemenways' federal rights in this regard would be derivative from Hoai's.

dicating any intent on the part of Congress to pre-empt the federal civil rights laws of the reconstruction era, which were certainly known to Congress in 1978 when it passed the PMPA. The only preemption of any other law in that Act is of state laws, at 15 U.S.C. 2806 and it is quite narrow, being confined exclusively to preemption of grounds for termination at common law and of the notice requirements for termination. See Bellmore v Mobil Oil Corporation (CA2 1986) 783 F2d 300, 304; O'Shea v Amoco Oil Company (CA3 1989) 886 F2d 584, 593; Senate Report No. 95-731, 95th Cong., 2d Sess. 15, 17-19, Reprinted in 1978 U.S. Code Cong. & Admin. News 875-77. The courts have found certain procedural preemption of state law by the PMPA's procedural requirements. Id. and cases cited. The Bsales case even if it means what J/D says, is irrelevant here. The point of Paragraph 20 is precisely

that here Hoai does not sue Sunoco under the Act's narrow prescription; he sues all the defendants under the civil rights acts. So the fact that he could not sue J/D under the PMPA has no relevance. He has not attempted to do so and certainly did not do so in this suit.

The Supreme Court, beginning in 1980 with Maine v Thiboutot (1980) 448 US 1, 4, 100 SCt 2502, 65 Led2d 555, has decided a series of cases in which it made it clear that 42 U.S.C. 1983 proscribes deprivation of federal statutory as well as constitutional rights. The action will lie unless (1) the statute does not create enforceable rights, privileges or immunities within the meaning of 1983, or (2) Congress has foreclosed such enforcement of the statute in question in the enactment of that particular statute. Wright v Roanoke Redevelopment and Housing Authority (1987) 479 US 418, 423, 107 SCt

766, 93 Led2d 781. We have just seen that the only preemption in the PMPA is with regard to narrow areas of state law.[6] With regard to the possibility of the first exception: this was resolved against the argument of Jones, Day in Wright, supra and Wilder, supra, as well as in Golden State Transit Corp. v Los Angeles (1989) 493 US ___, 110 SCt 444, 107 Led2d 420, and Pennhurst State School and Hospital v Halderman (1981) 451 US 1, 19, 101 SCt 1531, 67 Led2d 694. A review of these cases reveals that the only exceptions to the general principle that the action will lie whenever a federal statute is violated are when the law in question was passed by Congress and the context of the entire

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[6]We note, as the Supreme Court has, that the inquiry about these exceptions is not the familiar four part test of Cort v Ash (1975) for determination of whether there is implied private right of action. Wilder v Virginia Hospital Association (1990) 496 US ___, 110 SCt ___, 110 Led2d 455.

statute and its legislative history reveal that Congress intended neither to create new substantive rights nor to require states to recognize such rights, where the provisions of the federal statute are hortatory and not mandatory. Wilder, supra 110 Led2d at 468. All of these exceptions involve federal laws impacting governmental units and the statute creates an enforceable right under 42 U.S.C. 1983 unless it merely prescribes a certain kind of conduct for the governmental unit or the interest which the plaintiff asserts under it is too vague and amorphous such that it is beyond the competence of the judiciary enforce. Id. at 467. None of that applies here. The PMPA creates, and specifically preempts the states with regard to, a narrow area of interstate commerce. It creates a new procedural system for franchisees as a nationwide class, a class defined in the Act, to have

the benefit of certain new substantive rights, rights pertaining to the new concept of "franchise relationship" which the Act defines. It defines new rights against arbitrary termination of the franchise or non-renewal of the franchise relationship or both and new rights for the franchisee also concerning the notice of termination or non-renewal which he must be given. It could not be clearer. The Supreme Court has spoken. This PMPA right of Hoai is a federal statutory right enforceable under 42 U.S.C. 1983. The PMPA was a statute designed by Congress to give assistance to franchisees against arbitrary termination and nonrenewal of their franchises and to give some content to their reasonable expectations of a continuing relationship with their franchisors unless the franchisors have a legitimate marketing and economic rationale for the termination or failure to renew

the franchise. Senate report, supra. That it could be used as a sword to deprive the franchisees of their right to sue under 1983 for deprivation of the rights it grants them would be to defeat its broad remedial purposes.

The J/D opposition to the 1983 count finishes with a bizzarre argument concerning libel and slander and the privilege that attaches against defamation in court proceedings. All of that is irrelevant here. There is no suit for libel and slander. The allegations of lying and false swearing here and so forth are only intended to show the bad faith that defeats any claim, however inarticulate, of privilege for private counsel akin to that granted to judges and prosecutors by the common law. There is no privilege against having one's bad faith shown when it is relevant.

An examination of the two 1983 cases cited on p. 36 reveals that they are not applicable. In Holt v Castenada (CA9 1987) 832 F2d 123, 125-26, cert. den. 485 US 979 (1988), what was at issue was the immunity of a witness against liability under 1983 for testifying. That would not seem to be relevant. No defendant here testified in the Superior Court proceeding except for Vo's having filed an affidavit and that is not sued upon as the cause of action. Again, however, its falsity goes to credibility and bad faith. Katz v Morganthau (SD NY 1989) 709 FSupp 1219 also concerns witnesses being sued under 1983 for testifying in a criminal prosecution and is not relevant here in that regard. It also involved suing the prosecutors under 1983. That is not relevant. The common law immunity of judges and prosecutors is not available to these defendants.

III. JONES, DAY 1985 OPPOSITION

The complaint, even with plaintiffs having been deprived, as set out in the reply to Sun, of a reasonable opportunity to amend it, clearly alleges violation of 1985, not just of 1985(3). With regard to both 1985(2) and 1985(3), however, J/D is correct in pointing out that there needs to be an element of racially discriminatory intent. We acknowledge that the complaint, which, as gone into in detail in the reply to Sun's opposition, part II, plaintiffs had reasonably anticipated an opportunity to amend, is not clear on this point. The theory of plaintiffs in this regard is very simple, and it is based on the Supreme Court's holding in Griffin v Breckinridge (1971), the same case relied upon by J/D. Hoai and Vo are Vietnamese. Hoai was being preyed upon by Vo with the use of the classic tactics of threat, including mur-

der and extortion, which have been an unfortunate concommitant of immigration to this country by virtually every sizeable ethnic group that has come here. Sun knew of this because it was told of it, as both Peele and Vaughn have acknowledged. J/D knew of it because J/D was there at the TRO hearing when the testimony of the threats and attempts of violence and the extortion came out and, indeed, Roseman and Ottman cross-examined Peele, Hoai and the Hemenways about it. Vo sat during the testimony and declined to contradict it by testifying himself. Another J/D attorney, Davidson, was present for part of the testimony, but left precipitiously when the violent threats and attempts were described. He subsequently left J/D and moved to North Carolina.

If J/D, in particular, had gone on and simply conducted a follow on preliminary injunction hearing under Rule 65 that

would have been one thing. But that is not what they did. Instead they conceived of a scheme under which they concerted with Sun and its attorneys to evade a Rule 65 preliminary injunction hearing and to prevent appellants from having an opportunity to testify in any way to prevent Hoai's franchise from being taken from him and given to Vo in violation of the Constitution and the PMPA rights of Hoai as described above. The effect of this, knowingly and intentionally, was to relegate Hoai, and those assisting him, to the private justice system of the rule of threat and violence within the Vietnamese community which Vo was seeking to create. We believe that a jury is entitled to decide whether or not this is treatment that would have been accorded an ordinary American whose ethnicity was long assimilated under similar circumstances. We think plaintiffs deserve to be allowed to amend

their complaint to articulate this theory better.

The theory involves both 1985(2) and (3) because it involves a conspiracy by two or more to impede, hinder, obstruct or defeat in any manner the due course of justice in the territory of the District of Columbia under (2) for the purpose of depriving Hoai of the equal protection of the laws (that is, the same protection that an assimilated American with no such private "justice" system preying upon him and his kind would have to face and also under (3) for conspiring to injure Hoai and the Hemenways in their property, consisting of Hoai's station franchise, and the Hemenway's attendant contract and employment rights, and for having exercised their rights or privileges as citizens in causing the illegal scrambler Vo to have to remove his thugs and hangers on from Hoai's station, and in standing up in

court and exercising their rights there. It is that simple. By joining with Vo, knowing the illegal nature of what he was doing, and by assisting Vo in his acts by using the Rule 12-I(b), there was a conspiracy to deprive Hoai of his equal protection under the laws and of his privileges and immunities under the laws. There was Fifth Amendment territorial action. There was as well, and it is articulated in the allegations of what was done, though not directly as such,[7] a violation of 42 U.S.C. 1981 by the interference with the enforcement by Hoai of his franchise contract and with the employment contracts of the Hemenways, and of their rights to sue, be parties, to give evidence and to the equal benefits of the proceedings in the Superior Court (as opposed to the private "legal system" of

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[7]This is done in the amendment proposed below under the relation back doctrine.

Vo and his extortionate compadres which the defendants opted for instead. This was indeed the effect of, and, a jury could find, the intent of the using of the ex parte procedure. Further, under Section 1982 the same events interfered with the right of Hoai to lease and hold the real and personal property embodied in the franchise, and for the Hemenways, through him, the same.

The passage from Griffin which both sides rely upon is this:

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or otherwise class-based discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by law to all. (footnotes omitted, emphasis in the original)

No right is more fundamental, among those secured by the law to all, than the access to the law itself. It is the foundation for all other rights, without which

those rights would not be enforceable at all and would be as hollow as the glorious sounding rights ostensibly granted in constitutions of the Eastern bloc, where every day there is greater testimony to their total uselessness without a full system of courts governed by the rule of law. The private "system of justice" offered by the Vo's of the world who prey upon their own ethnic kind seeks to discriminate against its victims in the most invidous way of all, by cutting off access to the courts that the rest of us enjoy, by maneuvers such as this which make a mockery of due process and champion the rule of the brutal, outlaw aggressor over the legitimate rights of the law-abiding within that ethnic group. Those who concert and conspire to aid one such as Vo know the effect of what they do and their animus is to join in that deprivation of equal rights, to favor the strong man who

blocks equal access to justice for his own people. Just before this passage the Court says:

> giving full effect to congressional purpose -- by requiring, as an element of the cause of action, the kind of invidously discriminatory motivation stressed by the sponsors of the limiting amendment. (emphasis added) See the remarks of Representatives Willard and Shellabarger, quoted supra (emphasis in original), at 1797.

This is precisely what plaintiffs allege is the case here. An element of the cause of action is indeed just that kind of invidously discriminatory motivation. We are not talking here about depriving of a particular right under the law, as with 1983, rather we are talking about any access to the law the rest of us enjoy at all. To see this it is only necessary to advert to the remarks of Representative Shellabarger referred to, viz.:

> "... that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights,

shall be within the scope of the remedies of this section." (emphasis added)

It seems to plaintiffs that this replies to the contentions of J/D better than anything plaintiffs can say. For we think that a jury may, and is entitled to, decide that what the defendants intended, their animus, and what they effected, was precisely to "strike down" Hoai, to the end that he might not enjoy that equality of rights he should have been able to enjoy along with all other Americans, full and unhindered access to the Court to enforce his franchise agreement and then to have been able to operate for the rest of his life with his friends the Hemenways to assist him in that endeavor.

IV. THE NEW CLAIMS OPPOSITION

We reply that, under the circumstances gone into in the reply to the Sun opposition, part II, it is important for the Court to realize that there easily could

be a properly curative amendment. There is no attempt to make that amendment part of this appeal. Similarly the 1981 and 1982 claims are substantively alleged in the first complaint, which is part of the appeal.

V. PROCEDURE

We do not find Roseman's affidavit as innocuous as argued. It is an affidavit outside the record, regardless of the attempt to downplay its substance. Further its selections of matters from other records were not complete and were taken misleadingly out of context in many instances. They were not certified and if plaintiffs had been allowed to answer them fully the plaintiffs would have to do a lot of work and submit a lot of additional documents to make sure the distortions thus introduced were corrected. They were not given the chance. This is a classic example of a large firm using its large

photocopy machine to seek to win the day by preventing proper focusing on the merits. None of the three cases cited by J/D for looking beyond the record without going to summary judgment involved anything such as the "big xerox" technique used here. The first involved no extraneous documents other than letters incorporated in the complaint. In the second notice was taken of a man's judicial commitment to St. Elizabeth's. In the 9th Circuit case note was taken of complete records from the state administrative body whose decision was being appealed. None of the three cases (p. 45) involved the distorting dumping technique used here.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by U.S. mail, first class, postage prepaid, two true and accurate copies of the foregoing BRIEF this 12th day of April, 1991, upon each of the following: J. Gordon Forester, Jr., Greenstein, DeLorme & Luchs, Suite 300, 1220 19th Street, NW, Washington, D.C. 20036-2400; Robert Pleshaw, 729 15th Street, NW, Washington, DC 20005; Francis X. Markey, Jones, Day, Reavis & Pogue, 1450 G Street, NW, Washington, D.C. 20005.

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John D. Hemenway

Oral Argument scheduled for
May 13, 1991, 9:30 am

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

RECORD NO. 90-7170

THANH VONG HOAI, et al.,

Appellants,

THANH VAN VO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS THANH VONG HOAI, DAVID HEMENWAY AND JOHN HEMENWAY

REPLYING TO

BRIEF FOR APPELLEES SUN REFINING AND MARKETING COMPANY, J. GORDON FORESTER, JR., JEFFREY WAGNER AND JOSEPH ZULLI

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April 12, 1991

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THANH VONG HOAI, et al., Appellants,	)	
v.	)	Record Number 90-7170
THANH VAN VO, et al., Appellees.	)	

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CERTIFICATE OF SERVICE

I hereby certify that I have served by U. S. mail, first class, postage prepaid, two true and accurate copies of the foregoing Brief this 12th day of April, 1991, upon each of the following : J. Gordon Forester, Jr., Greenstein, DeLorme & Luchs, Suite 300, 1220 19th Street, NW, Washington, D.C. 20036-2400; Robert Pleshaw, 729 15th Street, NW, Washington, DC 20005; Francis X. Markey, Jones, Day, Reavis & Pogue, 1450 G Street, NW, Washington, D.C. 20005.

_____

John D. Hemenway

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THANH VONG HOAI, et al., Appellants, v. THANH VAN VO, et al., Appellees.	)	Record Number 90-7170

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	)	90-7170
THANH VAN VO, et al., Appellees.	)	

I. REPLY TO SUN'S OPPOSITION TO PLAINTIFFS 42 U.S.C. 1983 CLAIMS

The opposition of the Sun defendants (Sunoco, Forester, Zulli, Wagner, hereinafter, collectively "Sun") to plaintiffs' 1983 claims center around an alleged failure to have the requisite involvement with the color and authority of state (D.C.) law. Sun's opposition ignores the use made of the rules, canons and practices of the D.C. Superior Court by defendants to achieve the seizure of plaintiff Hoai's property and deprive him and his agents, the Hemenways, of federal rights. Instead, Sun points to the fact that defendants used the facially unconstitutional provision of Superior Court

Rule 12-I(b) as then existing, along with other rules and practices of the Superior Court, to violate, ultimately, D.C. law as well, as a shield against 1983 liability. Under this argument, parties may use unconstitional and federally prohibited rules and practices of a state court, if they are also careful to violate other state law (As ultimately found, provided the damaged party can survive long enough and fight hard enough.) We disagree. Plaintiffs read Lugar[1] to hold that even when the damaged party may eventually be vindicated under state law, if, in the meantime, the court's regulations and procedures provide for the attachment, or, as in this case, (even stronger,) the seizure of another's property in violation of due process and other federal rights, then private parties are not free to use those

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[1] Lugar v Edmondson Oil Co. 456 US 922, 102 SCt 2744, 73 Led2d 482

procedures without incurring potential liability under 42 U.S.C. 1983, particularly should they do so maliciously.

Sun would have this Court believe that what it did was what any attorney and client would do. The allegations of the complaint make it clear that plaintiffs believe otherwise. Ordinarily attorneys and their clients, using the ordinary processes of the Court, do not connive to use its facially unconstitutional rules and practices to undermine the very law that same court system is supposed to uphold -- state or federal. Superior Court Rule 12-I(b) (JA 1674) as then in effect, provided an opening which those bent on violating the federal and constitutional, (and D.C.) rights of others could drive a truck through. And that is what happened here. Faced with the possibility of a full preliminary injunction hearing which would have reversed a TRO which was itself ob-

tained by the use of some rules and customs of questionable validity (though the TRO procedure itself was not and is not alleged to be part of the 1983 violation) and would have allowed the testimony of Mr. Vo's extortion and threats of violence and murder to defeat the taking from Mr. Hoai of his station, the defendants found the device of Rule 12-I(b) and, bypassing any form of trial or hearing, were able to use the Superior Court's ex parte provision in that rule, a provision surrounded with no safeguards whatsoever, to carry out their scheme to attempt to make sure that without trial they could so damage Mr. Hoai and those who might assist him that there would be no hearing or trial. JA p. 389-390, paras. 39-45.

What Sun attempts here is a sort of Hobson's choice. On the one hand, Sun says, there was no involvement with the

state sufficient to create a 1983 cause of action because the attorneys and their clients knew they were violating the law. (Opp., pp. 9-10) On the other hand, even if there was involvement with the state it was only attorneys going about their normal business. (pp. 14-16) The plaintiffs point out in reply that this argumentation of the opposition has a straddling quality to it. If the allegations of the complaint are accepted[2] then the defendants were not just attorneys with their clients going about their normal business. But, says Sun, it is the allegations that the defendants were purposefully violating the defendants' federal rights, and their D.C. rights as well while they were at it, that show that there was no color and authority of state law involved. Under this theory of 42 U.S.C. 1983 jurisprudence, the wrongdoers

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[2]See below part II.

who purposefully find a facially unconstitutional procedural provision in the rules of a state court by which they may maliciously bypass both federal and state law to seize the property of their victims without benefit of hearing or trial and harm those victims severely while they are at it, may not suffer liability under 1983. They have an airtight system for violating federal rights by the use of state law. By using the state court procedures and manipulating the personnel, (D.C. judges and staff of the Clerk's office in this case,) maliciously and knowingly they insulate themselves against being liable for the violation of the federal and local rights under the color of the state court's rules and practice such as Superior Court Rule 12-I(b) even if that rule was at the time unconstitutional on its face. But if challenged, should the victims survive and be able to fight,

the wrongdoers can just assert that they were merely attorneys and clients doing their job. Plaintiffs submit that neither the theory that consciously wrongful use of facially valid regulations and practices nor Sun's theory (not candidly articulated as such) of absolute immunity for private attorneys and their clients who are consciously misusing local court regulations and practices to knowingly deprive others of federal rights will survive scrutiny under the cases of recent years.

In opposition Sun quotes Lugar for the following proposition:

> Not only must the plaintiffs be deprived of their rights under color of law, the "...party charged with the deprivation must be a person who may fairly be said to be a state actor." Opp., p.7

The Court will note that the immediately following sentence, which applies directly to this case, is omitted by Sun, viz.:

> This may be because he is a state official, because he has acted together with or has obtained aid from state officials, or because his conduct is otherwise chargeable to the State. (Lugar 457 US at 937)

Sun skips over this passage, which is the one really at issue here, and goes on to talk about the preceding sentence without the following one as a limit. Then Sun segues into a passage (opp. p.8) which acknowledges that Lugar was a case where "a private party jointly participates with state officials".[3] There follows a diminuendo in which it is not really explained why that was not the case here. There is merely the characterization that Lugar followed a long line of attachment cases -- as if that explained something.

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[3]In the Court below, where the record in this and the companion case shows Sun has great control, it shows that Sun argued that the wrongdoers had to be state officials or in conspiracy with state officials. JA 446-50. Apparently it feels that at this level its diversion tactics have to be cleverer, at least at first, as will be seen at p. 10 of the opposition.

No effort is made to explain why this is not a similar situation. It may be noticed that D.C. has a pre-judgment attachment statute and rule. But they have safeguards, such as hearings and due process, and did not provide the opening that Superior Court Rule 12-I(b) did. It is Sun's contention that if one can find state court rules and practices which aren't labelled "pre-judgment attachment" and can use them to effect an attachment, or, as here, an outright seizure, of a man's property without benefit of hearing or trial, then it's OK. Plaintiffs reply that if the set of rules and practices at issue has the effect of enabling the malicious user of it to take the property without hearing or trial long before the same can be reached then it is a Lugar situation, regardless of what it's called. The use of a facially unconstitutional provision to effect a pre-judgment seizure

in violation of due process, of PMPA rights, and other rights in avoidance of, a legitimate pre-judgment attachment procedure with safeguards, is a fortiori a greater infringement upon the prohibition of 42 U.S.C. 1983, not a "safe harbor". Sun may not escape the Rule of Lugar by such sophistry.[4]

After "sliding off" the meat of this issue, (p. 8) Sun asserts "plaintiffs complain of the issuance of a Temporary Restraining Order followed by a consent order." This, plaintiffs believe, is designed to mislead. Plaintiffs do not complain of the TRO per se as a violation of 42 U.S.C. 1983 though, for reasons going to the motivation and intent of the defendants, plaintiffs believed it necessary to assert the wrongs used to obtain

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[4]We note that Sun nowhere mentions or discusses the actual language of the Superior Court Rule in question, not even listing it in its list of authorities.

the TRO. It was the "extending" of the TRO through the facially unconstitutional judge in chambers rule that violated 1983 and is the linchpin of this action. Sun seeks to implicate the Court in a sort of misleading rhetorical "wink" that plaintiffs are attackers of the court processes as such. That is not the case. We say that the use of the court's normal process, regardless of false swearing and like having been used to obtain the TRO, violates 1983.

We say that the use of the unconstitutional rule violates 1983 and that, coupled with the use of the canons of ethics as adopted by the D.C. Court of Appeals[5] to "sandbag" Mr. Hemenway as was practiced then by Superior Court judges, violates 1983, that the use of the D.C. L & T law to override Plaintiff's PMPA

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[5]D.C. Code 1981 (Michie) Rules, Vol. 1, p. 183

rights, the use of the practice of allowing "payment" of supposedly preconditional bonds with checks that can easily be NSF (in this case drawn on the empty account of the seized business, an account set up and controlled by the wrongdoer himself, JA pp. 1100-02) violate 1983. We admit that these matters were not specified in the complaint, whether that be a failure to plead evidence or a failure to meet heightened pleading requirements.

But we point out that: A) Plaintiffs had moved for a stay pending the resolution of the related PMPA litigation before the same judge (JA pp. 1410 et seq., 1435 et seq.) so that they might supplement and amend once the matter of the PMPA rights of plaintiffs was resolved by the then pending summary judgment in the PMPA case, which were never ruled upon, and B) the court below converted from dismissal mo-

tions to summary judgment motions without allowing any opportunity after the PMPA decision for the contemplated amendment and supplementation and without requiring any Local Rule 108 fact statement from the movants and did so on the same day as the summary judgment in favor of plaintiff Hoai was granted in the PMPA case. Later, in a hearing on the record in this case below the lower court candidly revealed its motivation (JA 1592, lines 22-23) as being the same as that expressed by General Colin Powell which he had stated on CNN to a watching world just a few days before -- to cut off and kill what Sun was describing as all the litigation of Mr. Hoai.

Sun implies, without articulating, an immunity for private counsel and their clients akin to the traditional common law immunity for judges and prosecutors. We disagree. This was not the normal use of Superior Court procedures. It employed fa-

cially invalid rules and practices in bad faith. The single district court case cited by Sunoco does not provide sufficient grounds to justify the decision of the lower court here, on a dismissal motion converted to summary judgment without proper follow through procedures, that normal court process were being followed and that it was simply a resort to the court's processes.

At the bottom of p. 8 Sun quotes from this Court's decision on the intermediate appeal in the PMPA case of Mr. Hoai. Then, on the following page Sun, ignoring the Supreme Court's holding in Lugar, asserts that 1983 requires 14th Amendment state action and that there was none of that here. The thesis is that because this Court earlier ruled that the consent agreement was but a private agreement between the two sets of defendants here, it cannot have been state action. Plaintiffs

reply that it is the essence of 1983 violations that acts which are not properly state actions are clad, falsely, as actions of the state. This was one such. Some state actions involve actual state officers exceeding any legitimate authority granted them by the state and thus wrongfully "going private." Others, such as here, involve private parties making use of legitimate state actors for illegitimate purposes, purposes which are invalid under the federal Constitution and laws, because of regulations and practices which enable such usage. Sun seeks to confuse the two types. The state officials in Lugar who served the attachment pursuant to the unconstitional attachment statute and procedures were no different than Judge Eilperin of the Superior Court here. But he is immune; these defendants

are not.[6]

We should like to point out the misleading nature and essential inaccuracy of statements on pp. 11-12. It is represented that Rule 65 provides for a hearing upon two days notice where there is an ex parte notice and that instead of invoking this rule Mr. Hoai appealed the consent order. This deliberate confusion of the rule regarding ex parte TRO's with what happened here with a consent order executed by the Superior Court judge under the unconstitutional judge in chambers rule, the Court may recall, was also attempted by this same counsel in the PMPA case and was there rejected by this Court. Rule 65 procedures were not misused here by the defendants, the judge in chambers

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[6]It seems particularly inappropriate that in a case where intent of the defendants is so crucial a factor, there should be the conversion de facto to summary judgment and a decision in summary judgment without even a fact statement.

rule procedures were. Under Rule 65, had it been invoked properly, all parties would have had to have been notified and to have signed off on any consent order which, under federal case law, is clearly a conversion of a TRO into a de facto preliminary injunction. Use of Rule 65 was avoided by defendants precisely because its safeguards would have foiled their scheme.

The Court will recall and notice that in its earlier decision on the PMPA case intermediate appeal on the abstention question this same counsel attempted to convince it of the falsehood that Mr. Hoai was responsible for the action in the Superior Court in some way and that therefore Mr. Hoai could not pursue his federal claims in the court below and that Mr. Forester did so repeatedly in that intermediate appeal in both filings and oral argument and that this Court had to point

out to him, which is in the record, that Mr. Hoai had not pressed his federal claims in the Superior Court until absolutely compelled to do so by the combination of the inaction of the Superior Court, the treatment he received there and the stay of his claims without proper analysis by the court below. The Court should not then be surprised at these continuing misrepresentations and attempts to mislead.

Thus the Court should not be surprised that Sun repeats its now thoroughly rejected preclusion argument. A TRO is not res judicata and cannot effect collateral estoppel. Yet Sun makes that argument over and over again. It pled those defenses in the PMPA case and moved to dismiss on that basis. The lower court denied that motion without analysis or comment and, without proper analyis, sua sponte, entered a stay based on the ab-

stention doctrine. Sun nonetheless continued those arguments before this Court in the ensuing intermediate appeal in the PMPA case and was firmly rebuffed. On remand it continued to raise the arguments in filing after filing and does so in filings and oral arguments to this day. Plaintiff Hoai's motion in that case to have this continual baseless use of these preclusion arguments sanctioned and stopped was ignored by the court below and simply dismissed as allegedly moot without comment when the summary judgment mandated by this Court's earlier decision in that case was finally granted by the court below. Even earlier, as Sun acknowledges, the D.C. Court of Appeals had ruled that there was no decision on the merits in the Superior Court case. Sun acknowledges that the case is stayed -- and yet continues, as here, to argue preclusion. In the oral hearing before the D.C. Court of

Appeals Judge Reilly in particular, was somewhat incredulous when informed that Sun was doing this continually. He inquired as to why other courts did not just tell Mr. Forester that this was not so as a matter of law. Sun has still not stopped this baseless assertion.[7]

Finally, it should be noted that the last sentence of Sun's 1983 opposition is another misleading "tag line" presented without analysis or support in the hopes that if enough irrational and misleading

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[7]It should be further noted that it is a matter of record in the Superior Court proceeding, admitted to by Vo's attorney, Michael Arif, that Vo, through Arif, had settled the matter in its entirety by agreeing to abide by the decision of Sun's Mr. Peele as to who was the franchisee. Peele's decision was that Hoai was the franchisee. See record of arbitration at JA 624 et seq. The transcript of the Peele arbitration was ratified at Peele deposition JA 1705-1708. Filing such a pre-emptive strike suit in violation of a valid settlement agreement, agreed to by both Vo and Sun, was itself a sanctionable act. Not only did Mr. Vo file suit first and initiate all of these events, he did so baselessly and was then effectively joined in that baseless effort by Sun.

assertions are thrown out some will stick, a technique which has worked admirably for Sun in the lower court. Obviously there was no wrongful eviction found in the Superior Court as the merits have yet to be decided. Further, the decision by the lower court on Mr. Hoai's PMPA claims, (JA 964 and JA 979) compelled by the earlier appellate decision of this court, made it clear that there was no wrongful eviction by Mr. Hoai. For Hoai was the franchisee and was terminated by Sun on September 8, 1986. That is now res judicata by the lower court's summary judgment. Then Vo was, in Prosser's phrase, a "mere scrambler" and wasn't wrongfully evicted. It is now clear that by virtue of the illegal termination it is Sun that wrongfully evicted Hoai under that tortious doctrine in the District. It is this sort of thing that caused plaintiffs to move to stay the decision on the dismissal motions of

defendants until the resolution of the PMPA summary judgment motions.

II. PROCEDURAL QUESTIONS: CONVERSION TO SUMMARY JUDGMENT WITHOUT OPPORTUNITY TO AMEND OR SUPPLEMENT; NO FACT STATEMENT; IN THE FACE OF OUTSTANDING MOTIONS TO STAY

Plaintiffs filed the complaint as the statute of limitations was about to expire while the lower court was taking over a year to decide their summary judgment motion in the PMPA case. Hoai's PMPA summary judgment motion was filed in March, 1989 but wasn't decided till October 1, 1990. Forced to file a complaint whose allegations were necessarily going to be reshaped by what was later decided on the liability question in the PMPA case, plaintiffs moved to stay the resolution of the 1983 count pending the PMPA outcome, and then to allow for consideration of the impact of that then pending decision on the 1985 count. JA 1410 & 1435. In light of the impact of the issues in the PMPA

case, where Sun had cross-filed for summary judgment, this was logical.

Not only did the resolution of the PMPA claim establish unequivocally the violation of Mr. Hoai's PMPA rights per se, which also affected the rights of the Hemenways as his attorney and agent, but also it had, it became more and more obvious, many other effects as well. The question of Vo's being a mere scrambler so as to completely eliminate the red herring of Hoai's alleged wrongful eviction was just one of them. Such things as the availibility of a state common law remedy under the doctrine of Parratt v Taylor (1981) 451 US 527, 101 SCt 1908, 68 Led2d 420) would be one affecting the 1983 count. Such things as the claims of plaintiffs for having been injured in their property for having been witnesses and parties at the TRO hearing in the Superior Court would be very much affected

by the unknown outcome of the PMPA case -- it became apparent. That the franchise was Mr. Hoai's property was an issue affected by the outcome of the then pending cross motions for summary judgment in the PMPA case. It thus seemed eminently logical to await the outcome of those motions before undertaking to finalize the briefing and seek whatever amendments would be appropriate in this case.

Further, it is the law that when affidavits are filed with a dismissal motion under Rule 12(b)(6) for failure to state a claim and not excluded, (e.g. The Roseman Affidavit JA78 with exhibits A-L to include JA400, some 300 plus pages) the motion resolves into a summary judgment motion. The Court is then obliged to announce that resolution into a summary judgment motion and, in all but exceptional cases, allow some days (generally at least 10) for further briefing, amend-

ments to cure pleading defects, and motions for any discovery deemed necessary to resolution of the converted motions. (The Court below referred to these affidavits in its Memorandum Opinion in five different places. See:JA957) In addition there is the safeguard below of the fact statement required by Local Rule 108 from the moving parties. All that was ignored here. Instead, on the same day that the long-delayed summary judgment in favor of Hoai in the PMPA case was granted, this case was dismissed and a show cause was issued against counsel.

Subsequent events of record made it clear just why this was done and, though those subsequent events were not, obviously, before the lower court when it made its present decision, under the unusual circumstances of this case, because they candidly reveal the intentions of Judge Oberdorfer toward not only this litigation

but toward plaintiffs in general and Mr. Hoai's litigation as a whole and in particular when he made the decision which is the subject of the appeal. Plaintiffs were forced by the decision appealed from to respond to its show cause and to do so without specificity as to what it is that they were supposed to have done that violated Rule 11. In dealing with the sword hung over their head by the show cause plaintiffs and their counsel became convinced that not only had the lower court erred but that it had made serious mistakes and accordingly filed a Rule 60(b) motion, which is still pending. At the ensuing hearing, Feb. 5, 1991, the lower court revealed its intentions in doing what it did in issuing the decision, intentions which clearly are the sort of exceptional circumstances that make the ignoring of the procedural requirements normally surrounding summary judgment mo-

tions, and particularly those converted from Rule 12(b)(6) dismissal motions,[8] abusive of discretion and which also make the ignoring of the fact statement requirement of Local Rule 108 abusive[9] and which, further, make the consideration by this Court of arguments not made below imperative. For there can be no arguments below where the party who might make them has been deprived of the opportunity to do so by the court below. See the opinion of this Court in District of Columbia v Air Florida, Inc. (CA DC 1984.) 750 F2d 1077, 1084-1085.

As the record transcript of that hearing shows, counsel for Sun once again relied principally upon his oft-rejected

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[8]See Donaldson v Clark (CA11 1987) 819 F2d 1551, 1555.

[9]See this Court's opinion in Gardels v Central Intelligence Agency (CA DC 1980) 637 F2d 770, 773-74 and Thompson v Evening Star Newspaper Company (CA DC 1968) 394 f2d 774, 776-77 and the other cases cited.

but just as often revived preclusion argument, describing once again, couched in terms of a virolent attack on counsel (JA1573-1577), all of the litigation surrounding Mr. Hoai he could muster, (JA1575 and JA944-946) regardless of whether it involved his client and the events at issue in this case or not and regardless that the only decision of any finality did not involve his client or any defendant in this case other than Mr. Vo and involved federal statutes not at issue here, namely, RICO. Again Sun conveniently ignored that litigation was initiated by Vo. Going on at length in a thinly disguised repetition of his preclusion argument, Sun begged the Court to stop all of Hoai's litigation, speaking of it inclusively, not just this case. Following the personal attack on counsel, the lower court responded to Sun by stating unequi-vocally as follows: "The Court: I want to get

this done. What was it that General Powell said? Go ahead." (JA1592) We ask the Court to note that the cited Feb. 1, 1991 hearing was just one week after Genl. Powell had said to the entire nation and virtually the entire world on the most viewed television show ever produced that: "First we are going to cut it (the enemy) off, and then we are going to kill it." (JA1697-8)

Under these circumstances safeguards should have been observed not ignored, and plaintiffs' stay motions should have been ruled upon when the PMPA summary judgment was granted to Hoai with the moving parties in this case required to file a statement of facts claimed to be undisputed and with time for plaintiffs to file supplementally, amend and seek whatever discovery would be necessary. It is the purpose of the summary judgment procedure to assure that there are no

material factual disputes which should properly go to trial. In a case where intent is very much at issue, it was clearly the intent of the court below itself to ensure that plaintiffs did not get an opportunity to establish that there were material facts in dispute and that the complaint not be amended as it should have been.

III. THE 42 U.S.C. 1985 COUNT

The unamended complaint (ja01-22) was not artful because of the need to get something in before the statute ran once it became apparent that the PMPA case was not going to be decided before the three years had run, even though the summary judgment motion had been pending for over a year. It did not allege a violation of only subsection (3) of 1985. It alleged a violation of 1985. (JA19-20) In opposition it is pointed out that the deprivation of equal rights under 1985(3) re-

quires the racial animus or other class based inviduously discriminatory intent. The allegations of this in the original complaint[10] are not as complete as they could be, but it is clear: (1) that Hoai and Vo are Vietnamese; (2) that Hoai is a righteous Vietnamese and that Vo is an evil thug who preyed upon Hoai as he exclusively preys upon his fellow ethnics to the exclusion of other Americans; (3) that the other defendants knew this, and (4) that the Sun defendants in particular chose to abandon Hoai and give his property to Vo in violation of the federal rights of plaintiffs. Judicial notice should be taken of community knowledge of

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[10]As part of their Rule 60(b) motion plaintiffs have moved to amend. However, in light of the lower court's expressed intent it seems unlikely it will rule on the reconsideration motion out of fear that a ruling against plaintiffs on that motion would be appealable to this Court in time to be considered as part of this appeal, preventing the intended cutting off of Hoai's litigation.

racially oriented violence directed at Vietnamese. This we say bars plaintiffs from equal access to relief under the laws that are supposed to govern us and be available to all. Sun consciously decided that Vietnamese are such second class citizens and that a righteous Vietnamese could be denied access to the general law and its instruments. Every casual reader of American newspapers knows that Vietnamese are commonly abandoned to the familiar ethnic "mafia" type of organization that has plagued virtually every immigrant or minority group. This illegally discriminates, we argue, whether that contention is considered as applying the meaning of the statute or as a good faith extension of existing law. If private citizens can sue such characters and those who cooperate with them under 1985, such activity can be stopped by citizens themselves who are members of such ethnic

groups and who desire equal access to American justice. See our fuller discussion in the reply to the opposition of the Jones, Day defendants.

IV. CHILLING WITH A SHOW CAUSE

Every court of appeals that has considered the new version of Rule 11 has cautioned in one case or another that it should not be used to chill creative or vigorous advocacy. Here the lower court has stated that its purpose is to cut off and kill Mr. Hoai's litigation. (JA 1592; cf JA1697) Further, it has done so by simply issuing a show cause as part of its decision (JA955) where the rest of the decision consists of adopting the brief of certain of the defendants (Jones, Day)(JA1032-1063) without independent analysis, relying upon the findings and conclusions of those defendants in a manner which would not have been supported by the record if the lower court had not been

assiduous in making sure that there would not be a full record for this court to review.

V. PRAYER FOR RELIEF

For all of the foregoing reasons, appellants pray that their cause will be remanded to the District Court for trial.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by U.S. mail, first class, postage prepaid, two true and accurate copies of the foregoing Brief this 12th day of April, 1991, upon each of the following: J. Gordon Forester, Jr., Greenstein, DeLorme & Luchs, Suite 300, 1220 19th Street, NW, Washington, D.C. 20036-2400; Robert Pleshaw, 729 15th Street, NW, Washington, DC 20005; Francis X. Markey, Jones, Day, Reavis &

Pogue, 1450 G Street, NW, Washington, D.C. 20005.

John D. Hemenway

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THANH VONG HOAI,
927 N. Highland St.
Arlington, Virginia
and

JOHN D. HEMENWAY,
4816 Rodman St., N.W.,
Washington, D.C.
and

DAVID HEMENWAY,
4816 Rodman St., N.W.,
Washington, D.C.

Plaintiffs,

v.

Civil
Action No.

THANH VAN VO a/k/a
Thoi Van Vo,
2242 Senseney Lane,
Falls Church, Virginia,
and

MILLARD F. OTTMAN, Jr.,
8111 Gatehouse Road,
Falls Church, Virginia,
and

DAVID C. ROSEMAN,
6511 Brawner Street,
McLean, Virginia,
and

JONES, DAY, REAVIS and POGUE

Cleveland, Ohio,
and

J. GORDON FORESTER, Jr.,)
1220 19th Street, N.W.,)
Washington, D.C.)
and)
)
GEOFFREY WAGNER,)
)
Tulsa, Oklahoma,)
and)
)
JOSEPH ZULLI,)
)
Philadelphia, Pennsylvania,)
and)
)
SUN REFINING AND MARKETING)
COMPANY, INC.,)
)
Philadelphia, Pennsylvania,)
)
Defendants.)

COMPLAINT

I. JURISDICTION

1) This Court has Jurisdiction Under the Civil Rights Laws 42 U.S.C. 1983 and 42 U.S.C. 1985 and to award attorneys' fees under 42 U.S.C. 1988 for violations of rights of due process guaranteed to the plaintiffs by the Constitution of the United States and violations of the rights of the plaintiffs to petition for the

redress of grievances guaranteed by the First Amendment.

2) All of the acts complained of herein were either committed in the District of Columbia or committed outside of the District of Columbia with the intent to affect the plaintiffs within the District of Columbia.

II. VENUE

3) Plaintiff Hoai, in April of 1986, was granted a valuable gasoline station franchise and lease by the defendant Sun Refining and Marketing Company, Inc. ("Sunoco") which station was located in the District of Columbia at 2305 Pennsylvania Avenue, S.E.

4) The franchise contract between Hoai and defendant Sunoco was negotiated and entered into in Alexandria, Virginia, but concerned the station in the District of Columbia.

5) An alleged contract of transfer claimed by defendant Vo as transferring the station business from plaintiff Hoai to defendant Vo was a document executed in Virginia though the threats of death and violence used to make defendant Hoai sign it were made in Virginia and the District of Columbia.

6) The conspiracy to deprive the plaintiffs, as a legitimate franchisee and his agents, of protection of the law equal to that accorded an intruder who had accomplished possession by deceit and threats of violence and death, occurred principally in the District of Columbia, though it did involve telephone calls to Sunoco's legal department in Philadelphia.

7) The use of the color and authority of the laws, customs and rules or regulations of the courts of the District of Columbia to deprive plaintiffs of rights, privileges and property without due pro-

cess and in violation of their rights to petition for the redress of their grievances occurred principally in the District of Columbia.

III. PARTIES PLAINTIFFS

8) Plaintiff THANH VONG HOAI ("HOAI") is a citizen of the United States who resides at 927 N. Highland St., Arlington, Virginia and did so reside at all times pertinent hereto. He did business at the gas station in question in the District until intimidated by threats of murder and violence from Vo and another from coming to that site.

9) Plaintiff JOHN D. HEMENWAY is a resident of the District of Columbia and a member of its bar. He participated in meetings about the gas station as HOAI's counsel and took part in the events at the gas station on August 25 and 26, 1986, as alleged herein as newly-retained counsel for Hoai. He was then named as a

defendant in a law suit in the Superior Court of the District of Columbia as part of the events complained of herein.

10) Plaintiff DAVID HEMENWAY is a resident of the District of Columbia and the son of JOHN D. HEMENWAY. He had met and become acquainted with HOAI and helped to persuade his father to help Hoai as an attorney. Throughout the events alleged herein he acted to help the Hoai as the latter's friend and agent and also to help his father if he could.

DEFENDANTS

11) Defendant THANH VAN VO ("VO") is an adult resident of Virginia who resides at 2242 Senseney Lane, Falls Church, Virginia, and did so reside at all times pertinent hereto.

12) Defendant DAVID C. ROSEMAN resides at 6511 Brawner Street, McLean, Virginia.

13) Defendant MILLARD F. OTTMAN, Jr. resides at 8111 Gatehouse Road, Falls Church, Virginia.

14) Defendant JONES, DAY, REAVIS and POGUE is the law firm partnership of which the third-party defendants ROSEMAN and OTTMAN were members at the times in question. It has an office and does business in the District of Columbia and did at all times pertinent hereto. Its main office is in Cleveland, Ohio, which has a statute permitting suing a law partnership in a single name and serving it in one place, its headquarters, with a single service.

15) Defendant Sunoco is a major oil company whose headquarters are in Philadelphia, Pennsylvania, and which is incorporated in Delaware and registered to do business in the District of Columbia, where events complained of took place and where the service station franchised and leased by it to the plaintiff is located.

Its resident agent in the District of Columbia is CT Corporation Systems, whose address for such resident agency is 1030 15th Street, N.W., Washington, D.C.

16) Defendant Joseph Zulli is a staff attorney for defendant Sunoco and the head of its legal department, or so Sunoco managerial personnel responsible for the station in question have stated. He was head of the legal department at Sunoco and participated actively in the decision to use the color and authority of state-law to deprive plaintiffs of rights, privileges, immunities and property under color of D.C. Law and otherwise.

17) Defendant Geoffrey (or Jeffrey) Wagner is a staff attorney for defendant Sunoco, who was, at the times pertinent hereto, in its legal department in Philadelphia under the management of defendant Zulli. He was in the legal department at Sunoco and participated actively in the

decision to use the color and authority of state law to deprive plaintiffs of rights, privileges, immunities and property under color of D.C. Law and otherwise. After the controversy arose he was moved to the Sun pipeline division in Tulsa, Oklahoma, conveniently, and Sun has fiercely resisted the plaintiffs' obtaining any information which would shed further light on what he did. After the storm passes, if it does, Sunoco plans to fire him, plaintiffs believe.

18) J. Gordon Forester, Jr., is an attorney practicing in Washington, D.C., who was retained as outside counsel by Sunoco and participated as such in the events complained of. Though he states that he was merely a water boy following orders from Wagner and/or Zulli in carrying out the acts which are the subject of this complaint, plaintiffs do not believe that attorneys are so free to ignore or

disclaim responsibility for the import of actions they take or filings with a court that they sign and, accordingly, allege that he participated as a principal in the acts which are the subject of this complaint.

IV.

19) During the events complained of herein, defendant Sunoco first encouraged plaintiff Hoai, who had previously been their employee for a number of years, as well as an owner of a prior franchise from Sunoco, in Maryland, to apply for a lease and franchise, (formerly "dealership,") then, after a thorough procedure of evaluating him against other applicants, granted him a lease and franchise, entering into a lease and franchise with him and doing so in the Commonwealth of Virginia, the agreement being for the lease and franchise of the Sunoco station on

Pennsylvania Avenue, S.E., in the District of Columbia.

20) Plaintiff Hoai had previously been a dealer of Sunoco's for two years more or less in Greenbelt, Maryland and, therefore, under the terms of the Petroleum Marketing Practices Act (PMPA) 15 U.S.C. 2801 et seq. by statute cannot have been and was not a trial franchisee in his franchise with Sunoco at 2305 Pennsylvania Avenue, S.E. despite the title on the franchise agreement and was in fact a regular franchisee or dealer by definition under the terms of the Federal statute, regardless of any language in a contract. (He does not here, however, sue under that federal Act, but has done so separately.)

21) Defendant Sunoco adduced and then acknowledged, through its regional supervisor overseeing the station, Ernest Peele, that the relationship of defendant

VO to plaintiff Hoai was purely represented by defendant VO to be that of a lender, for Peele was told this by VO together with HOAI in April of 1986, well before the events in question here, though the representation by VO that he was lending money to HOAI for the business as a fellow Vietnamese businessman on a friendly basis was a false claim because in fact what VO did was to claim to be lending $35,000.00 to HOAI for the franchise by depositing the same into an account at a far away bank which he, VO, opened as a "favor" to HOAI and insisting on controlling as "security."

22) In fact VO never put any such $35,000.00 into the bank account he insisted on controlling and refused to let HOAI have access to as alleged "security" but only "salted" the account with a few thousand dollars and then took control of the station's daily receipts, also in the

name of "securing" his "loan" and deposited them into the station account which he had established and taken control of.

23) That the account was insufficient and VO was not telling the truth in this regard became evident and was known to SUNOCO when the first large check for gasoline on the station account, in excess of nine thousand dollars, bounced and was returned for insufficient funds at the end of April, 1986, and at that time HOAI informed SUNOCO of VO's deceit in this regard.

24) VO and HOAI had both told Peele of Sunoco under specific questioning that VO was a lender to HOAI and not one who had in any way a partnership or equity interest in the franchise in question, hidden or overt.

25) As events in question developed, defendant Sunoco acknowledged in May,

June, July and August of 1986 that plaintiff Hoai was being improperly excluded from the station which they owned and of which they have maintained throughout he was, at the time, the franchisee.

26) During these months defendant Sunoco encouraged plaintiff Hoai to take steps to help himself to stop the usurping activity of defendant VO and secure his lease and franchise from the ongoing intrusion of VO. Sunoco was on notice as to, and acknowledged to plaintiff Hoai the ongoing threat of extortion including threats of death and violence.

27) Nonetheless, when plaintiff Hoai did so act to stop the illegal activity by VO, instead of standing by the plaintiff HOAI and supporting him as promised, defendant SUNOCO then made an agreement or deal with the defendant VO in condonation of what was known to defendant SUNOCO to be VO's extortionate and fraudulent behav-

ior in violation of its franchise agreement with plaintiff Hoai in order to "keep pumping gas" and SUNOCO effected this deal with VO by illegal and unconstitutional use of the color and authority of the laws, customs and regulations of the District of Columbia, to wit, by "extension" of an improvidently granted Temporary Restraining Order (TRO) without notice to Hoai and the other two plaintiffs, known to SUNOCO and VO to be HOAI's attorney and agent representing him at the time. This failure to involve or give notice to plaintiffs was despite the fact that it was well known to all defendants that Hoai was the legitimate franchisee of the franchise in question and the primary party at interest under applicable law.

28) But plaintiff HOAI remained named as franchisee and lessee of the defendant SUN OIL AND REFINING COMPANY for the station in question by terms of his agreement

for seven months thereafter more or less though his franchise had de facto been terminated and interfered with by VO and the defendant Sunoco, after which Sunoco sent a letter to plaintiff HOAI that he was not going to be kept as a lessee and franchisee because during the time in which Sunoco conspired with VO to keep him out of the station he, HOAI, had allegedly not pumped enough gas or in the alternative, he had allegedly not kept proper storage records. Both tasks had been made impossible by the actions of Sunoco in concert with or through the other defendants, particularly Vo, in violation of their contract with plaintiff HOAI.

29) The plaintiff John D. Hemenway, at the times pertinent hereto, was the attorney for and represented the plaintiff HOAI.

30) The plaintiff David Hemenway, at the times pertinent hereto, was the agent

of the plaintiff HOAI, and he is a son of John D. Hemenway. He was working with Hoai at the service station franchise located at 2305 Pennsylvania Avenue, S.E., Washington, D.C., which was taken from Hoai by extortionate methods, using deceit and threats of violence, coupled with acquiring the capital of plaintiff Hoai by inducing him to enter into another business, the Mekong Food Service Center, a Vietnamese specialty food and gift shop located in the Mekong Center Building at 3107 Wilson Boulevard, Arlington, Virginia, by deceit, which business was then forcibly taken from HOAI by others acting in concert with defendant VO, along with its inventory, worth over $49,000.00 at cost, and the ongoing business as built up by plaintiff HOAI.

31) So that VO, acting with others, simultaneously prevented HOAI from being able to operate his gas station business

by "suckering" HOAI's capital for the gas station under the guise of the promise of a phony loan into another business and then taking both business interests in a classic extortionist's maneuver.

32) As part and parcel of these maneuvers by VO and others not named in this suit, but whose actions plaintiffs advised the defendants herein of at various times, the defendants herein ROSEMAN, OTTMAN and the firm of JONES, DAY, REAVIS, and POGUE, in combination with VO as their client, on August 28, 1986, used sworn affidavits which they knew were false, or, in the case of the attorneys for VO, should have known they were false as reasonable men in their profession, and using those false affidavits filed and obtained a motion for a TRO in the Superior Court of the District of Columbia, which, by the ineptitude and error of that court they obtained (since, under applicable federal

law even the false swearing in the affidavits did not justify the TRO).

33) This TRO was obtained by the attorney and defendant OTTMAN by false statements made to the Superior Court judge which statements were accepted as fact erroneously and incompetently by that judge and she made "findings" based upon mere colloquy with defendant OTTMAN as if his statements were postulates with nothing else in the record to support them. The legal theory upon which these findings were based and upon which the TRO was bottomed was not even before the Superior Court and had not been included in any way by the defendants VO, ROSEMAN, OTTMAN, and JONES, DAY, REAVIS and POGUE in any filing that was then before the Superior Court, no notice as to it was given. But the defendants named used an erroneous and illegal theory of law based on false swearing, and, in the case of defendant OTTMAN,

of false testimony, (though not under oath,) to use in turn the color and authority of the Superior Court and its customs to deprive plaintiff HOAI of his service station franchise and livelihood and income and to deprive the plaintiff JOHN D. HEMENWAY of his representation of plaintiff HOAI and his station franchise and DAVID HEMENWAY of his work in the station with plaintiff HOAI and his possible partnership interest in the same.

34) Further, by false charges and in violation of applicable law the defendants VO, ROSEMAN, OTTMAN and JONES, DAY, REAVIS and POGUE deprived plaintiff HOAI of his right to a counsel of his choosing and plaintiff JOHN D. HEMENWAY of his right to freely represent his client HOAI in accordance with applicable law, all of this being done under color and authority of the laws, regulations or rules, and customs of the District of Columbia.

35) Similarly, the same defendants, by the use of false swearing and false testimony as aforesaid, deprived all of the plaintiffs of their freedom to travel in and in the vicinity of the gas station franchise in question and to operate the same.

36) At that time the present defendant in this suit, SUNOCO, was named by the present defendants VO, ROSEMAN, OTTMAN and JONES, DAY, REAVIS and POGUE as a co-defendant in the Superior Court suit and SUNOCO, as a result, held itself out throughout the TRO hearing as "standing by" its dealer, the plaintiff HOAI, testifying on HOAI's behalf (defendant VO, though present, declined to testify, as he has ever since on pertinent topics), through it area representative and supervisor, Ernest Peele, and HOAI's attorney, with the acquiescence and consent of

Peele, was also SUNOCO's attorney at that TRO hearing. This was on August 29, 1986.

37) Secretly, at some time on or after September 3, 1986, however, defendant SUNOCO changed sides without notifying plaintiffs, in order to keep "pumping gas" with the specific purpose of intent of depriving its dealer of his franchise.

38) Defendant SUNOCO entered into an independent agreement with the defendant VO, through the offices of the defendants ROSEMAN, OTTMAN and JONES, DAY, REAVIS and POGUE for VO and the defendants ZULLI, WAGNER and FORESTER for SUNOCO, under which the lawyer defendants falsely represented to the SUNOCO management that was responsible for the station that under the law of the District of Columbia, by making this "deal" between them SUNOCO and VO could give the station to the latter, along with its supply of product from

SUNOCO, by "extending" the TRO by agreement between them without notice to or involvement of plaintiff HOAI or his counsel or agents.

39) Consequently, on September 8, 1986, the aforesaid defendants did so "extend" the TRO by a "consent order" from which plaintiff HOAI was specifically excluded by its terms, which declared the agreement applicable to SUNOCO and VO only and not to HOAI.

40) The defendants obtained a signature from a Superior Court judge on this "consent order" extending the TRO based on false swearing and only after obtaining that signature did they reveal their bargain and deal whereby SUNOCO had abandoned its franchisee and removed his station from his control by delivering to HOAI, as that franchisee, and his counsel a copy of the "consent order".

41) The signing of this "consent order" merely ratified the agreement between SUNOCO and VO and did not represent any independent judgment of the Superior Court.

42) Nonetheless it was done under the color and authority of the Superior Court and its rules and the laws governing it as well as its customs, and the defendants held out to the Sunoco managers directly responsible for the station, Peele and Vaughan, that the Superior Court had required this result depriving HOAI of his station and franchise. Defendants held this out to others as well.

43) Thus the lawyer defendants held out falsely that a TRO could be extended without notifying the major party in interest and without his consent and that there were holdings and findings in a TRO hearing at which the defendant VO had declined to testify and the only live

"testimony" was his lawyers false statements and the affidavits were falsely sworn, which holdings and findings required the agreement and "side-switching" by the defendant SUNOCO which was in fact voluntary. Then they used the device of getting an unwitting judge of the Superior Court (not the TRO judge) to sign and ratify their voluntary agreement without any exercise of independent judgment by that judge to give their merely private agreement the color and authority of the laws, regulations and customs of the District of Columbia in order to deprive plaintiffs of their property, rights, privileges and immunities as complained of herein.

44) For over two years afterwards defendant SUNOCO and its attorney, defendant FORESTER, though fully cognizant of the falsity of these representations, continued to represent that this "exten-

sion" of the TRO, which represented no independent judgment by any Superior Court judge, was "res judicata" and that the attempts by the plaintiffs to negate its insidious and harmful effects legally, which had been necessitated by these acts of the defendants, were a "collateral attack" on the "judgment" of the Superior Court, even after the United States Court of Appeals for the District of Columbia Circuit, in a separate proceeding against the defendant SUNOCO by the plaintiff HOAI, had pronounced in a formal opinion that such was not the case.

V. COUNT ONE

Violation of Civil Rights Laws, 42 U.S.C. 1983, Color of D.C. Law

42) Plaintiffs incorporate herein by reference the allegations of 1 through 41 above.

43) The law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia as well as the Due Process clause of the United States Constitution and the right to petition for the redress of greivances enshrined therein require that in any proceeding, no action be taken which principally affects a party to that proceeding without adequate notice to that party and a chance being granted for that party to respond and participate in that process which affects his interests.

44) Here the defendants, and all of them, schemed and planned to evade those requirements and to instead use the very color of law and apparent authority of the Superior Court to deprive the plaintiff Hoai of those important rights, privileges and immunities and of his property the gas station franchise.

45) The use of the "extension" of the TRO by a "consent order" not involving and specifically excluding the plaintiff HOAI was a conscious device adopted knowingly to deprive the plaintiff HOAI of his property and his right to petition for redress at a follow-on hearing without due process of law and in violation of law and rules and to do so by a false appearance of judicial authority or mandate when there was in fact no independent judgment involved and all that was involved was a voluntary agreement between and among the defendants to thus deprive plaintiff HOAI and his counsel and agent, the two Hemenways,i.e., by the color and authority of the laws of the District of Columbia governing its courts and judicial processes.

46) For years thereafter, the defendants, in varying capacities and degrees, continued to so use the color and authority of the District of Columbia to

deprive plaintiffs of their due process, deprive them of their right to petition for redress in accordance with the law and otherwise deprive them of their right to work and operate in freedom from harassment and oppression.

WHEREFORE the plaintiff HOAI claims, under this Count One,

damages for the loss of his station and franchise in the amount of $30,600,000.00, being the full value of the franchise he was thus illegally and unconstitutionally deprived of under color and authority of the laws, regulations and customs of the District of Columbia over a span of twenty years, plus attorneys fees in excess of $300,000.00 and mounting and for the deprivation of his right to counsel of his choosing.

Plaintiff John D. Hemenway prays for attorney's fees and lost opportunity time in the amount of $300,000.00 and mounting

for the deprivation of his right to represent the business and participate as HOAI's counsel and the loss of business and business time and the loss of his job and office arrangement which directly resulted as well as for deprivation of his right to represent clients within the law, free of being disqualified by false swearing and false representation in violation of an attorney's duty to forswear false representations and participation in wrongdoing by the defendants OTTMAN and ROSEMAN and their firm, JONES, DAY, REAVIS and POGUE.

Plaintiff David Hemenway prays for damages in the amount of $300,000.00 dollars or above for the deprivation of his participation in the station business and the job affiliated with it.

VI. COUNT TWO,

42 U.S.C. 1985

47) Plaintiffs incorporate herein by reference the allegations of 1 through 41 above.

48) The same constituted a conspiracy to deprive defendant Hoai of his property rights by the agreement and conspiracy entered into by Roseman, Vo, Ottman, and the defendant Jones, Day, Reavis and Pogue by the use of false swearing in affidavits and false testimony by OTTMAN under the guise of argument of counsel to deprive the plaintiffs of property, rights privileges and immunities as set out in Count One above, the same being hereby incorporated by reference, all of which constituted an invidious discrimination by which a rightful franchise holder is discriminated against in favor of an intruder by deceit and threats of violence.

49) Under the effects of such a conspiracy there is an invidious discrimination against the legitimate holder of a

franchise as a representative of such a class and by virtue of his holding of the franchise as against those who have no such legitimate claim but rely upon deceits and threats of force.

50) This was accomplished here by a knowingly false use of a charge of being a landlord under color of District of Columbia law by defendant SUNOCO as the only landlord actually involved acting in conspiracy with the other defendants.

WHEREFORE the plaintiff HOAI claims, under this Count Two,

damages for the loss of his station and franchise in the amount of $30,600,000.00, being the full value of the franchise he was thus illegally and unconstitutionally deprived of under color and authority of the laws, regulations and customs of the District of Columbia over a span of twenty years, plus attorneys fees in excess of $300,000.00 and mounting and for the

deprivation of his right to counsel of his choosing.

Plaintiff John D. Hemenway prays for attorney's fees and lost opportunity time in the amount of $300,000.00 and mounting for the deprivation of his right to represent the business and participate as HOAI's counsel and the loss of business and business time and the loss of his job and office arrangement which directly resulted as well as for deprivation of his right to represent clients within the law, free of being disqualified by false swearing and false representation in violation of an attorney's duty to forswear false representations and participation in wrongdoing by the defendants OTTMAN and ROSEMAN and their firm, JONES, DAY, REAVIS and POGUE.

Plaintiff David Hemenway prays for damages in the amount of $300,000.00 dollars or above for the deprivation of his

participation in the station business and the job affiliated with it.

[BY HAND: A jury trial is respectfully demanded. per JDH]

Respectfully submitted.

Thanh Vong Hoai
David Hemenway
By Counsel

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91-1341

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

Appendix 3 to
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VON HOAI, ET AL,:
PLAINTIFFS, : C A NO. 89-2397
V. : JUDGE OBERDORFER
THANH VAN VO, ET AL. :
DEFENDANTS. :

SUPPLEMENT TO THE MOTION FOR SANCTIONS ON BEHALF OF SUN REFINING AND MARKETING COMPANY

THE DEFENDANT FILED A MOTION FOR SANCTIONS ON DECEMBER 4, 1989, AND, BY ITS ORDER FILED OCTOBER 2, 1990, THIS COURT ISSUED A RULE TO SHOW CAUSE WHY MR. ELGIN AND MR. HEMENWAY SHOULD NOT BE SANCTIONED. THIS MOTION IS SET FOR ORAL ARGUMENT ON FEBRUARY 1, 1991.

COUNSEL FOR PLAINTIFFS HAVE NOW, BY THEIR RECENT ACTIONS, EXCEEDED THE BOUNDS OF DECENCY AND PROPRIETY. IN AN INTERVIEW PUBLISHED IN THE JANUARY 14, 1991 ISSUE OF U.S. OIL WEEK, A NATIONWIDE PUBLICATION ON TRENDS IN PETROLEUM MARKETING[1] BOTH COUNSEL MADE STATEMENTS WHICH ARE BLATANT

[1]Exhibit 1

LIES, WHICH WERE CALCULATED TO ADVANCE THEIR OWN INTERESTS AND SERIOUSLY DAMAGE SUN REFINING AND MARKETING COMPANY. JOHN HEMENWAY AND LAURENCE ELGIN MUST BE SANCTIONED BY THIS COURT PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

THE CIVIL RIGHTS CASE HAS BEEN DISMISSED. YET, THE ATTEMPT IS MADE TO BOLSTER THE PENDING 60(B) MOTION BY A FALSE CLAIM OF RACISM. THIS ENORMOUS DISTORTION IS AS FOLLOWS:

> "A former local Sunoco dealer is Meeting with groups representing the abundant Vietnamese community here to consider a boycott against Sun over alleged racism, Oil Week has learned."
>
> * * *
>
> Outside the courtroom, Jay Gordon Forester allegedly told Hoai's attorney John Hemenway that "all Vietnamese are liars."
>
> Forester hotly denies the story "Hemenway is not telling the truth," he said.

THE QUOTE, ATTRIBUTED TO COUNSEL, IS A TOTAL FABRICATION. IT IS DESIGNED TO DAMAGE SUN AND TO IMPAIR THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN SUN AND ITS COUNSEL. PUBLISHED DURING THE PENDENCY OF THE MOTION TO SET ASIDE THE JUDGMENT, COUNSEL NO DOUBT HOPES TO LEND SOME CREDENCE TO HIS SPECIOUS CLAIM OF DISCRIMINATION IN THE CIVIL RIGHTS COMPLAINT.

THE SECOND EXCERPT IS PRECEDED BY THE FOLLOWING CAPTION:

"DEALER: SUN AWARDS STATION TO VIETNAMESE CRIME FIGURE."

THE LEAD CONTINUES WITH:

> "In a case ignited by alleged links to organized crime, charges of racism and even death threats, a Washington, D.C. dealer faces down Sunoco this spring in a court battle."

THESE ARE NO MORE THAN BIZARRE ALLEGATIONS, EXISTING ONLY IN THE MALIGNANT MINDS OF HEMENWAY AND ELGIN. THERE IS NOT ONE SCINTILLA OF EVIDENCE OF "ORGANIZED CRIME,"; THERE ARE CHARGES OF RACISM, BUT

THERE IS NO EVIDENCE OF RACISM AND THE "DEATH THREATS," ARE UNSUPPORTED ALLEGATIONS BY HOAI, INFLAMED AND EXAGGERATED BY ELGIN AND HEMENWAY.

THE WILD CHARGES CONTINUE - AGAIN TOTALLY UNSUPPORTED - THAT "THANH VAN VO TURNED OUT TO BE INVOLVED IN A VITENAMESE ORGANIZED CRIME RING IN NORTHERN VIRGINIA..."

THE PLEADINGS OF PLAINTIFF COMPARE MR. VO TO AL CAPONE AND THEY CONTINUE WITH THE CHARGE, AD NAUSEAM, THAT HE IS A "MERE SCRAMBLER." THEY HAVE ACCUSED HIM OF PEJURY WITHOUT SUBSTANTIATION. THESE ARE ALL FANTASIES. THERE IS NO EVIDENTIARY SUPPORT FOR ANY OF THESE ALLEGATIONS. THE EVIDENCE IS CLEAR THAT THANH VAN VO FOUGHT FOR HIS COUNTRY AS A MAJOR IN THE AIR FORCE OF SOUTH VIETNAM; THAT HE WAS TRAINED AS A HELICOPTER PILOT BY THE U.S. ARMY; THAT HE IS A HARD WORKING NATURALIZED CITIZEN WHO SUPPORTS HIS WIFE AND

CHILDREN. MR. HOAI, TO THE CONTRARY, NEVER DEFENDED HIS COUNTRY AND, AS HE ADMITS, LEFT HIS CHILDREN BEHIND IN VIETNAM. HE NOW HAS FOUR MORE BY THE WIFE HE MARRIED IN THE UNITED STATES. HE IS UNWORTHY TO MAKE SUCH SLANDEROUS ALLEGATIONS AGAINST MR. VO.

THE CALUMNY CONTINUES WITH JOHN HEMENWAY ACCUSING SUN OF SUBORNATION OF PERJURY, IN THAT HE TOLD OIL WEEK "THAT HE BELIEVES SUN PUT PRESSURE ON DISTRICT REP ERNIE PEELE TO ALTER HIS STORY SUBTLY, AND THUS UNDERMINE HOAI'S CASE." THIS IS BOLSTERED BY A PARTIALLY CORRECT QUOTE FROM MR. PEELE'S DEPOSITION THAT "SUN'S LEGAL DEPARTMENT GAVE HIM SOME 'GUIDANCE AS TO HOW TO HANDLE THIS SITUATION (IN COURT).'"

THE ACTUAL TRANSCRIPT STATES AS FOLLOWS:

> Q. (BY MR. ELGIN) .. NOW GOING FORWARD TO THE TIME AFTER THE HEARING AGAIN, DID THERE COME A TIME WHEN YOU'RE (SIC) LEGAL DEPARTMENT FORBADE YOU TO COMMUNICATE FURTHER WITH MR. HOAI, OR MYSELF OR MR. HEMENWAY, OR

ANYBODY ON OUR SIDE OF THE MATTER?

A. I DON'T RECALL THAT. I'M SURE THAT I WAS GIVEN SOME GUIDANCE AS TO HOW TO HANDLE THIS SITUATION. (DEPOSITION OF ERNIE PEELE, JANUARY 5, 1988, PP. 54-55).

THIS IS A MCCARTHYISTIC TACTIC OF TAKING A HALF TRUTH, COUPLED WITH A LIE TO MAKE IT APPEAR TRUTHFUL.

LARRY ELGIN AND JOHN HEMENWAY HAVE SUNK TO NEW LOWS BY THEIR LIES AND DISTORTIONS. THIS IS NO LONGER AN ADVERSARIAL CONTEST, BASED ON FACTS AND LAW, WAGED IN COURT BY PROFESSIONALS LEARNED IN THEIR CRAFT WHO SEEK TO PERSUADE THE FINDER OF FACT THAT THEIR CAUSE IS JUST. THEY HAVE INSTEAD MOVED THEIR BATTLE TO THE STREETS AND THE BACK ALLEYS, RENEGADES ACTING OUTSIDE THE LAW,UTILIZING LIES, DISTORTIONS, INFLAMMATORY RACIAL EXHORTATIONS AND THE MEDIA TO SEEK A VICTORY AT ANY COST.

THIS COUNSEL IS NOT SO NAIVE AS TO BELIEVE THAT SANCTIONS WILL RESTRAIN THESE

LAWYERS AND THEIR OUTRAGEOUS TACTICS. YET, THE DIGNITY OF THIS COURT IS AT STAKE, AS THEY CONTINUE TO RUN AMUCK THROUGH ALL STANDARDS OF ETHICS AND PROFESSIONALISM.

THIS COURT IS IMPLORED TO REFLECT UPON THESE MONSTROUS ALLEGATIONS MADE BY HEMENWAY AND ELGIN IN THE TRADE PRESS. COUNSEL FOR DEFENDANT IS ALLEGED TO HAVE MADE A RACIST REMARK WHICH IS CATEGORICALLY DENIED. THEY ARE USING THIS LIE TO MOUNT A BOYCOTT AGAINST SUN, SEEKING ECONOMIC LEVERAGE AND SUPPORT FOR THE SPECIOUS CLAIM OF DISCRIMINATION. THEY SLANDER SUN BY CLAIMING THAT IT AWARDED A STATION TO A "VIETNAMESE CRIME FIGURE." THEY CHARGE THE DEFENDANT WITH SUBORNATION OF PEJURY ALLEGING THAT WE PRESSURED MR. PEELE TO "ALTER HIS STORY."

THIS CONDUCT CANNOT BE TOLERATED. IT MUST BE CENSURED. THESE MEN ARE NO LONGER WORTHY OF THE PROFESSION, AND, UNLESS THEY

ARE RESTRAINED AND SANCTIONED, THEY WILL CONTINUE THIS ABOMINABLE BEHAVIOR TO THE DETRIMENT OF THE ORDERLY ADMINISTRATION OF JUSTICE.

RESPECTFULLY SUBMITTED,

/S/ J. GORDON FORESTER, JR. #4424
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In the matter of	:	
Thanh Vong Hoai	:	Civil Action No.
	:	
Plaintiff	:	87-2456-LFO
	:	
v.	:	
	:	
Sun Refining and	:	
Marketing Company,	:	
Inc.	:	
	:	
Defendant	:	

Tuesday
January 5, 1988

DEPOSITION OF:

ERNEST PEELE

* * *

Q. [By Mr. Elgin]: Now, do you recall -- I realize it's been some time now, but do you recall testifying about these matters in the Superior Court last year?

A. Yes I do.

Q. Have you had any opportunity to review that testimony since you gave it?

A. Yes.

Q. Do you still substantially agree with it today?

A. Yes, I do.

Q. In that case, it will probably eliminate a lot of the questions I would otherwise ask.

MR. FORESTER: Well, for the record, he was under oath then, he's under oath now.

MR. HEMENWAY: Why don't I introduce it into the record then, his deposition?

Q. Well, let me ask a few questions. In reviewing it, have you found anything at all in that testimony that you would feel might have been mistaken, or for whatever reason, you would wish to correct or clarify today? Or is it essentially stand by it all?"

A. As best I can remember, everything I said there would be basically what I would say today.

Q. Okay. Now, I wonder Mr. Forester, in order to cut down this time enormously, how many copies of this?

MR. FORESTER: I've got four. I've got enough.

Q. Four copies? Now, I would like to then submit that for the record, Mr. Recorder.

REPORTER: Exhibit 12.

Q. Exhibit 12. The testimony of Mr. Peele in the Superior Court proceeding.

* * *

C E R T I F I C A T E

This is to certify that the foregoing proceedings in the matter of: THE DEPOSITION OF ERNEST POOLE [SIC] held on: JANUARY 5, 1988 at the location of: 1323 RHODE ISLAND AVENUE, N.W., WASHINGTON, D.C. were duly recorded and accurately transcribed under my direction; further, that said proceedings are a true and accurate record of the testimony given by said witness; and that I am neither counsel for, related to, nor employed by any of the parties to this action in which this deposition was

taken; and further that I am not a relative nor an employee of any of the parties nor counsel employed by the parties, and I am not financially or otherwise interested in the outcome of the action.

/s/ NEAL R. GROSS

Notary Public/Reporter in and for

THE DISTRICT OF COLUMBIA

My commission expires

MARCH 31, 1989

NEAL R. GROSS

Court Reporters and Transcribers

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(202) 234-4433

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

THANH VAN VO,)

Plaintiff) DOCKET NO. CA-7075-86

v) August 29, 1986

THANH VONG HOAI,) [STAMP: Received Sep 19

et al,)'86, 2:44 PM/SCDC]

Defendants.)

The above-entitled matter came on for a hearing before the HONORABLE ANNICE WAGNER, Judge, in Courtroom Number 2100.

A P P E A R A N C E S

MILLARD OTTMAN, ESQUIRE, ATTORNEY

On Behalf of Plaintiff.

DAVID C. ROSEMAN, ESQUIRE, ATTORNEY

On Behalf of Plaintiff.

PHILIP DAVIDSON, ESQUIRE, ATTORNEY

On Behalf of Plaintiff.

JOHN HEMMENWAY [sic], ESQUIRE, ATTORNEY

On Behalf of the Defendant.

LAURENCE A. ELGIN, ATTORNEY

On Behalf of the Defendant.

* * * *

ERNEST L. PEELE,

having been called as a witness for and on behalf of the Defendant, and having been first duly sworn by the Deputy Clerk, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ELGIN

Q. Could you state your name for the record?

A. My name is Ernest L. Peel. [sic]

Q. Would you spell your last name for the Reporter?

A. P, as in Pennsylvania, e-e-l-e.

Q. And Mr. Peele, what is your employment?

A. I am a representative for Sun Oil Company, Sunoco.

Q. And in the capacity of a representative for Sun Oil Company how long have you been employed with that company?

A. 16 plus years, be 17 in October.

Q. 17 years in October. Now, what is the nature of your job? What do you do as a representative for Sun?

A. Well, I am the liaison between the dealer and the company and my functions range from interviewing dealers, on being a financial counselor and acting as the, I guess the go-between between the dealer and the company. So most of the business that is conducted with franchisee is done through me and the company.

Q. And in your work with the dealers, when do you first commence your relationship as a liaison between the dealer and the company?

A. Well, it depends if its a new deal or an existing dealer. If it's an existing dealer, I take over from whomever was there before me and we continue to do business from that point on. If it's a new dealer I am the guy that generally selects and interview that dealer and then put him in business.

Q. Now, you are the one that selects and interviews the dealers for the Washington, D.C. area?

A. Washington, D.C. and Northern Virginia.

Q. Northern Virginia. Now, in that capacity, did you select a dealer for a station on Pennsylvania Avenue, South East?

A. Yes, I did.

Q. And how do you designate that station? What do you call that station?

A. Sun Station at 2305 Pennsylvania Avenue.

Q. South East.

A. South East.

Q. Now, are you familiar with the gentlemen, the two gentlemen in this room, Mr. Hoai, who has been identified on the record and Mr. Vo?

A. Yes, I am familiar with both.

Q. Now, is either of these gentlemen a dealer with whom you have dealt on behalf of Sun Oil?

A. Yes. Mr. Hoai is our dealer who has a contract with us, with Sun Oil Company.

Q. So Mr. Hoai is a dealer?

A. That's correct.

Q. And Mr. Vo is not.

A. No.

MR. OTTMAN: Excuse me, your Honor, could we avoid counsel repeating every statement of testimony.

THE COURT: I'll sustain the objection.

MR. ELGIN: All right, your Honor, I just wanted to avoid any charges of leading the witness.

Q. Now, could you describe briefly your taking on Mr. Hoai as a dealer?

A. Well, in the process that this station was closed and I advertised and I interviewed a lot of people. And Mr. Hoai, I interviewed him. Mr. Hoai, I knew him previously because he was an employee for Sun Oil Company before, he was a former dealer with Sun Oil Company. And I had not been his representative, but there was a couple of other people who had. And he was highly recommended by my peers and who had been a very good dealer with us. So I selected him as the dealer. And as a result of that selection process, is that it's an interview, several interviews, how are we going to run a business, do you have capital to go into the business and this the type interview that I carry on.

Q. Now, when you interviewed him, did you-- what do you check when you interview him? What did you check out when you interviewed him? What factors were important in making your decision?

A. Well, number one, he had a history with us, number one as being an operator and one who knows the business. The second and probably important, it is very important that the person has ample capital to operate a service station. And when I say that, I mean that I will give him an application and he fills out an application, and then I have my credit department run a check on that application, and with the financial information that is given we then make our decision as to accept or not accept.

Q. What kind of capital did Mr. Hoai have?

A. Initially when I talked to Mr. Hoai, I told him what was needed to enter into the

business, which was somewhere between 65 and $70,000. Mr. Hoai told me that he had about thirty thousand of his own money, 30, $35,000 of his own money and he had a friend who was loaning him the additional capital to go into the business.

Q. Did he mention the name of that friend to you?

A. Yes, that was Mr. Van Vo, whom I met.

Q. You met with Mr. Van Vo. And what did Mr. Hoai and Mr. Van Vo tell you about Mr. Van Vo's role in this dealership?

A. Well, I questioned both of them extensively about that and one of my questions to Mr. Hoai, this loan, first I wanted to know the pay back arrangements of the loan because that can impact the business in that the loan was made in a way that Mr. Hoai would have ample time to pay it back, it wasn't a loan that I'll give you today and I need my money back six months from today because businesses

just don't function that well. But the whole crux of that conversation was that Mr. Vo was loaning Van (sic) the money as a friend who was helping him get into the business and that that loan was to be paid back, start principle, was to be paid back after the first year of business. During the first year only the principle would be paid -- excuse me, not principle, interest would be paid during that period. Sounded like a very good deal from the standpoint that they were friends and he wanted to help Mr. Hoai get back in business, and that was it. I also questioned both of them in saying now, this loan is straight up, there is no behind the scene partnership, okay, ownership of this money being invested or being loaned, and the answer was unequivocally, no. Find. I don't have any problems with that.

Q. So based on that you went ahead and granted the distributorship?

A. I granted the franchise.

Q. Franchise.

A. To Mr. Hoai.

Q. And once the franchise was set up, did you then regularly see both gentlemen in the business?

A. At first Mr. Hoai was there and then about I guess there was a two, three week period after the business opened and we were scheduled to open April 1, but we got some delays in there, I don't know whether it was in the contract form or something came up, officially we opened on April 10th, and Mr. Hoai was there. And about three weeks or a month, maybe a month, five weeks, I'm not sure, Mr. Hoai was there. And then Mr. Hoai wasn't there and I got concerned about his absence and I said where is Mr. Hoai, and this is to Mr. Van. Van Vo. And he was saying that Mr. Hoai had gone to see his sick brother in West Virginia or something. Well, that's

understandable. The thing was that it got a little longer and I said I am not being told or this game isn't being played right, Hoai is supposed to be here. And we have a clause in our contract where personal supervision of the person that I've given the contract to should be there. And that's why I finally got back in touch with Hoai and I called his home and they told me he was out of town, well, that was fine. And when he did get back, I told him, I said hey, you know, you are supposed to be at the station. I've seen Van there, and I've talked to Van. Well, didn't matter to me because they were such good friends and with his loaning him the money. Fine. Okay, you're still helping your fellow countryman, I suppose.

At that point, you know, when I finally got and sort of talked to Mr. Hoai, he was saying that Van was putting him out of the station. I said he can't put you out

of the station. How is he going to do that? You know. I said you are the dealer and I talked to Van and I've always said look -- he said well, why won't he sell me the business, I said well he can't sell you the business unless he comes through us. And I want to tell you and tell Hoai, that Hoai you've got to be here. Mr. Vo, you know, I don't care what the problem is between you and Mr. Hoai, you two have to settle that. But with Sun Oil Company, Hoai is my dealer. And I told him that several times. And in fact I even had my manager down and we talked with Van and this has been going on for some time and that Van, we do not recognize you., Hoai is the dealer, now you two please work this thing out.

Q. Did they ever work it out?

A. Evidently they didn't, we're sitting here.

Q. Was there ever a time that you and your company or your manager or anybody connected with Sun Oil Company recognize Mr. Van Vo in any way as being a franchisee or dealer of the Sun Oil Company?

A. We have not.

Q. Now, in this station that we're speaking of, the station property itself is owned by the Sun Oil Company, is it not?

A. That's correct.

Q. Did you ever in any way recognize Mr. Van Vo as being the lessee of the property?

A. No.

Q. Do you allow someone to sublease a property lease from you without notice to the Sun Oil Company?

A. No, that is a violation of the contract. If a dealer wants to sell his business, it is in the contract he has that right but with the proviso that we, as a company have got the right to reject

or accept the new buyer, okay, and the present lessee must give us something in writing saying that he is negotiating to sell his business to give us an opportunity to interview and go through the normal channels of accepting a dealer.

Q. Now, so there is the franchise to distribute the petroleum products and there is the lease, those are two separate things, is that right?

A. Well, the lease itself is incumbent upon the fact that it's a total business there, and the product because it is a branded product, they must sell our product, gasoline.

Q. Now, is there anything other than the franchise to sell your product and the lease that comprises the business of a Sunoco station? Is there anything other than those two things?

A. Would you repeat that question? I am not sure I understand that you're --

Q. Well, is there anything to the business other than the lease and the franchise to distribute the Sun Oil Products, that's the whole business, right, those two things?

A. That's the business.

MR. ELGIN: I have no further questions of this witness at this time, your Honor, in deference to your Honor's admonition.

PEELE -CROSS

THE COURT: You may inquire.

Do you have any questions?

MR. ROSEMAN

Q. Mr. Peele, after the station opened on April 10, did there come a time when you told Mr. Vo that you discovered a shortage in the inventory, that you had done at the time the station closed in January?

A. Right. What happened there was the inventory from the previous --

Q. Excuse me.

THE COURT: You've answered the question.

Q. Please just answer my questions.

A. Okay.

Q. Thank you. And did you tell Mr. Vo that there may have been a mistake when you did the inventory and that you were concerned you might have to personally make it up with Sunoco?

A. No, this was to Mr. Hoai.

Q. Okay, did you tell that to Mr. Hoai?

A. Yes.

Q. Was that on April 10?

A. When did I write that out, it could have been April 10. April 9th, I think I might have a copy of when I actually wrote up the invoice on the ground inventories that were there and inventories on hand.

Q. Did you ask Mr. Hoai or Mr. Vo if they would make up the difference for you with a check?

A. No.

Q. Did there come a time on April 10 when you received a check from Mr. Vo in the amount of the inventory shortage. $1458.00?

A. The inventory that was there was from the previous owner. And what I had done is given the previous owner credit and I said, Mr. Hoai, I know this -- the inventory was here, I think there was a break in and some of the products might be gone. And I said, I'll tell you what, to keep the accounting at bay, I will just invoice you for the product that I gave him credit for and I said now we'll make up this to you, I don't care whether it's short or there or not. I had originally gotten an amendment to the lease for $2500, I said I'll give it to you for $2000 and I said that will cover anything. I said you've got to make out on the deal.

THE COURT: Does that answer your question whether he's given a check?

MR. ROSEMAN: I'm sorry, your Honor, it doesn't.

THE WITNESS: Well, the check was given to me for the product that I billed him for, which was the inventory on hand.

MR. ROSEMAN: Your Honor, I don't know what the protocol here is in chambers, but I would like to show the check to Mr. Peele and ask if he can identify it.

THE COURT: All right.

A. Again the check was fourteen sixty-eight and some change.

Q. Well, perhaps we can avoid marking it then if you remember the check clearly.

A. That's right.

Q. Do you remember who signed the check?

A. I'm not sure whether it was Hoai or Vo. I'm -- I know I got the check.

Q. Do you remember who physically handed it to you? Wasn't it Mr. Vo who handed you the check?

A. Could have. I don't know.

Q. Now, during the operation of the station through the spring and the summer, you personally collected the rent from the premises, didn't you?

A. The first check was given to me in the form of a cashier's check for $2,000. From that point on we have what we call an electronic rent draft check that is set up by the bank and our bank, and the dealer signs the form which means that money for rent is automatically electronically transferred from their account to our account.

Q. Is that the procedure that was used at the 23rd and Pennsylvania Avenue station?

A. Yes. I got the first check, as I said for 2000, okay, it was a certified check. And then the rent draft, as we call it, from that point on the rent was being taken out automatically from the account that Mr. Hoai signed the papers for, giving us authorization to do it.

Q. Now, you say the rent was being taken out of an account automatically pursuant to a rent draft from the dealer.

A. From the dealer.

Q. And that money was being drawn on the account of the person you recognized as the dealer?

A. That's correct. Mr. Hoai had to sign the rent draft form that we get a copy of and send to the bank.

Q. Are you aware of where the account was located, from where those payments were made?

A. They were coming out of a bank out of Virginia, I believe.

Q. Would that have been the McLean Bank (phonetic).

A. Is that it? I'm not sure. All I know is when they give me a (indiscernible) check that will put this rent draft in the process and Hoai is the person who signed that rent draft form, then it is, by my

credit department, from that point on it is done electronically.

Q. Well, are you aware that the owner of that checking account, McLean Bank, is Mr. Vo? Did there come a time when you became aware of that?

A. Not really, because the original monies that were put into the business, the $7000, $2000 rent, the $5000 was given to me from Mr. Vo, but at that time, it still was, to me, okay, and the understanding was that this was monies that Vo was loaning to Hoai. So, you know, it didn't -- I mean this was an established fact that he was loaning him the money so I didn't have any reason to question the fact that the money was coming from Vo simply because they both had told me that he was loaning him money.

Q. Did there come a time when Mr. Vo told you that he had purchased the business from Mr. Hoai

A. He told me that he had given Hoai some money for the business, and I said well, you know, Hoai just can't sell you the business, it's got to come through me before we can make any transfer of business.

Q. Well, he showed you a document that was called a contract of sale of business, didn't he?

A. He did. That was one for $1.00. I think, a contract, somewhere I saw something about Hoai turning the business over to Vo for $1.00, and I said but Hoai still can't do that. My contract says, hey, you have to come through me. He just can't sell his business to anybody. I said --

Q. Well, did you explain to Mr. Vo that what you were speaking of was approval of Sunoco, the approval of the transfer?

MR. OTTMAN [sic]: Your Honor, counsel is testifying, let him ask the question.

THE COURT: Your objection is overruled, he can lead witness if he wishes to on cross. Go ahead, please.

THE WITNESS: Repeat the question, please.

Q. When you were speaking with Mr. Vo about this, isn't what you were telling him that Sunoco had to approve the transfer, not that Sunoco had to make the transfer, isn't that what you meant?

A. Well, yes, we do have to make the -- we have to approve the transfer, right, and until we do that we don't recognize it.

Q. I see. But the dealer, franchise agreement itself, would permit the transfer of the dealership or the reassignment of the dealership, it's just that Sunoco must approve it.

A. Provided that we are told that we get in writing from the dealer that he is in the process of selling his business or

transferring it, and with the proviso that the new person is acceptable to Sun Oil Company.

Q. What you really needed with them were two things, you needed Mr.Hoai to initiate this approval process as the person who signed the dealer agreement with you, and then you needed to satisfy yourselves of the credit worthiness of the new dealer. Is that right?

A. Hm-hm

THE COURT: I am sorry, what was the answer?

THE WITNESS: Yes. Yes.

Q. Now, did you have any reason to believe that Hoai -- that Mr. Vo would not be credit worthy to Sunoco?

A. No.

Q. In fact, you knew that Mr. Vo at the very least, had provided all of the funds for the operation of the station at that time, didn't you?

A. Not totally. I knew --

Q. I'm sorry.

A. Pardon?

I new from what they were telling me that Vo was loaning Hoai something in the nature of 35 to $40,000. Now, this is what Van Vo and Mr. Hoai told me initially when I was interviewing Mr. Hoai.

Q. You are the person upon whom Sunoco relies to make a decision as to the credit worthiness, the desirability of the dealer to operate the station?

A. The credit worthiness is done through my credit department. That's why I need an application on an individual, and they handle that function. It is my responsibility to interview the individual, to try to come to some decision on certain that the person has -- or business background to operate a business.

Q. All right, well, would it be fair to say that you were satisfied that Mr. Vo

was at least, as to the second requirement that you identified, was credit worthy and satisfied that requirement to be a dealer.

A. Well, I don't know that, because I didn't have a credit check on him.

Q. Okay. So as far as your input in determining whether a dealer receives a franchise agreement, were you satisfied that Mr. Hoai,(sic) apart from the credit check, that Mr. Vo was qualified to operate that station as a dealer?

A. Well, I think he was qualified with one proviso in there that I knew that he was involved in a lot of other things and we look for people who are going to be specifically operators of that particular location. Now, it's not to say that I would totally discount anyone, but anyone who does not have time to be there and operate the station, that is why I would not select them.

Q. Well, you testified earlier though, that Mr. Vo was the one at the premises whenever you went by and that you in fact became concerned that Mr. Hoai was never there.

A. That's correct.

Q. So you knew that Mr. Vo was the one who was at the station, certainly of the two of them.

A. Yes, I knew that. But I also know that Mr. Vo is involved in a lot of other businesses and he has another service station somewhere. Texaco.

Q. Is that right? Do you know that for a fact?

A. Well, that's what he told me. I'm talking about Vo told me this.

Q. Now, did there come a time when you told Mr. Vo that as far as you were concerned, he could be the dealer to the station as long as Sunoco approved it and

they went through the formalities of having the transfer.

A. I probably could have said that.

Q. And in fact you said that after you saw the purchase agreement, this contract that you mentioned a little bit earlier, is that right?

A. I could have. I don't remember in detail. I don't recall specifically saying that from the standpoint of say looking at the contract and giving him an answer to that, no, I -- you know.

Q. Okay, did you tell Mr. Vo that what was really necessary at this stage, in fact the only thing that was necessary was for Mr. Hoai to make the initiated request and start the process?

A. I said in order for him, and I don't recall exactly, that in order for Mr. Vo to be considered for a dealership, would be for Mr. Hoai to initiate and give us the paper work necessary.

Q. Mr. Vo asked you for help in getting Mr. Hoai to do that, didn't he?

A. Well, he probably could have and I kept seeing -- Mr. Hoai was telling me that Van was like forcing him out of the station and my question to Hoai was, do you want the station? Yes. I said well, you're the dealer. Now, that problem exists between you and Van, and I can't make that decision as to who, you know, it's going to be. I can't go there and tell Van to leave, or I can't tell you to tell Van to go down the road.

MR. HEMENWAY [SIC]: Thank you, Mr. Peele, I have nothing further.

MR. ELGIN:

Q. Mr. Peele, you mentioned that Mr. Van Vo told you about other businesses he owned. What were they? What were these other businesses he told you about?

A. Well, I think he owns a service station, a Texaco Service Station, and I know

he owns a vending, a number of trucks with vending.

Q. That would be coin vending machine operations?

A. Oh, stands that you see on the street, you know, hot dogs, selling novelties, that type.

Q. And this other service station he owns, did he tell you what company that was with?

A. Texaco, I believe.

Q. You normally give Sun distributorships for franchises to people who own rival businesses with other oil companies?

A. I have done it, we try to keep it to a limit, but you know, it's done.

Q. It's something you do very carefully though.

MR. OTTMAN: Objection, leading.

THE COURT: Sustained.

MR. ELGIN: Well, your Honor, they asked leading questions up and down. When

I objected to it, my objection was overruled.

THE COURT: Counsel, this is your witness called on direct, you may not lead him, the opposing side on cross examination surely you know, after this many years of practice, that they can. Those are the rules.

Proceed.

MR. ELGIN: All right.

Q. What process do you go through when someone asks to have a Sun distributorship and they also own a distributorship or franchise for another company?

A. Well, I give them the same consideration I would do anyone who does not have another business, I probably would try to go look at the other operation to see how they operate that, that would give me some idea as to how they are going to operate my business.

Q. In this case though, you never reached that stage?

A. I didn't have any reason to.

Q. Now,I just want to understood [sic] the answer you gave to opposing counsel on one question and that is the answer you gave when he asked you about account at the McLean Bank. It was the McLean Bank did you answer it was McLean Bank or --

A. From looking at the check, I think it was McLean Bank.

Q. And the -- opposing counsel asked you if you knew that account was the account of Mr. Van Vo rather than Mr. Hoai, and I didn't quite get the answer to that.

A. I said I wasn't sure. All I know is that account when we have our rent draft on it, it was signed by Mr. Hoai, so who has control of that account somehwere --

Q. You didn't know.

A. I don't know.

Q. You didn't know. As far as you knew it was being paid by Mr. Hoai?

MR. OTTMAN: Objection, leading.

THE COURT: Counsel, don't lead the witness. Rephrase your question.

MR. ELGIN: I'm sorry, your Honor.

Q. All right, let me rephrase the question. Did you have any knowledge of anyone other than Mr. Hoai controlling that account?

A. No, I do not. I did not.

MR. ELGIN: No further questions on redirect, your Honor.

THE COURT: Sir, could you tell me the date on which you were made aware of the agreement between Mr. Hoai and Mr. Vo, the written agreement? The approximate date, month?

THE WITNESS: That -- gosh, this is really -- when was the date -- Mr. Hoai had another attorney and we met at the

station, and I don't know, I think it was in June sometime, that was when someone came up and said Hoai had ---

THE COURT: Well, you don't have to tell me that, all I wanted to know was the date on which you think you learned about the agreement.

THE WITNESS: Sometime in June, your Honor.

THE COURT: Of this year.

Did you see a copy of that document?

THE WITNESS: It was in Vietnamese and I --

THE COURT: You say a copy of the document in Vietnamese?

THE WITNESS: Right. And I can't say what it was.

THE COURT: Was both - who was present when you saw that document?

THE WITNESS: Mr. Van Vo, Mr. Hoai, Ms. Solene (phonetic) --

THE COURT: Did Mr. Hoai or Mr. Vo tell you what the document purported to be?

THE WITNESS: Verbally that --

THE COURT: Who told you what between these two?

THE WITNESS: It would be Mr. Vo.

THE COURT: What did he say?

THE WITNESS: That Hoai had signed this document giving him the business.

THE COURT: And what did Mr.Hoai say?

THE WITNESS: Well, the amount was like for a dollar and Mr. Hoai said he was forced to sign this paper.

THE COURT: That's what Hoai told you?

THE WITNESS: Standing there, the four of us.

THE COURT: Were you on the premises much? How often were you on the premises?

THE WITNESS: Initially, quite often. Maybe twice a week and after maybe once a week and after that maybe two weeks.

THE COURT: And each time you went there, who did you see in charge?

THE WITNESS: As I say the first four to five weeks, Hoai was around. Then all of a sudden, Hoai was missing and after I finally got back in touch with Mr. Hoai, up to that point, Mr. Hoai was saying that if he goes back there he was afraid of his life or something, and he just wasn't there, Van was there.

THE COURT: Was Van there each time you went?

THE WITNESS: He was either there or you could call him on the telephone and get him there. Normally I would try to make an appointment or get somebody on the telephone if I wanted to communicate with them.

THE COURT: Do you know whether this business had a license from the Government?

THE WITNESS: It was on the wall.

THE COURT: Did you know whose name the license was in?

THE WITNESS: There was one that was Sonntag (sic), initially there was some with Mr. Hoai's name on it, and then that changed.

THE COURT: It's your contention that Mr. Hoai had a license to operate this business?

THE WITNESS: Yes.

THE COURT: And then you say it changed.

THE WITNESS: Then I saw Sonntag --

THE COURT: When did that occur?

THE WITNESS: This had to be after that month or five weeks after the disappearance of Mr. Hoai here.

THE COURT: Can you tell me approximately what month that was in?

THE WITNESS: That had to be in May.

THE COURT: Does the company become involved with whether or not the fran-

chisee have licenses? Are you concerned about that?

THE WITNESS: Yes.

THE COURT: Did you do any investigation when you ascertained that the license was not in the name of Hoai?

THE WITNESS: Well, with the initial license --

THE COURT: The question is whether in May of 1986, when you found out that Sonntag became the person holding the D.C. License, whether or not the person to whom you gave the franchise had an appropriate license.

THE WITNESS: No, I did not investigate that.

THE COURT: All right.

Are there any questions as a result of the Court's questions?

MR. ELGIN: Yes, your Honor. Do you want to go first?

MR.HEMENWAY: Yes.

THE COURT: All right. Well, why don't you go first because then I'll give you the last word since it's your witness.

FURTHER DIRECT EXAMINATION BY MR. ELGIN

MR. ELGIN: He said something so quickly there that he -- he said afraid for his life. Could we clarify what he was talking about, what he said?

Q. He said he was afraid for his life?

A. The conversation with Mr. Hoai and he had another attorney by the name of Solene (phonetic), and I went to lunch with them, and when I say Hoai, it's your business, you should be there, and he says, well, if I go back there, you know, something might happen to me, somebody might break my arm or my leg or whatever, that kind of conversation came to me and I -- I didn't know what to say at the time that point. He was saying something about cowboys and I said cowboys, what cowboys? And evidently it must mean that someone within

the Vietnamese community kind of controls. That was my interpretation of it. It doesn't have to be but at least that's what I thought.

MR. OTTMAN: If the Court please, could we strike all this testimony --

THE COURT: I'll strike his interpretation.

MR. ELGIN: Well, wait a minute, he said that they were talking about violence, breaking legs --

THE COURT: Sir, I heard what he said, I'm striking what he said his interpretation was. I'm letting his answer to your question stand.

MR. ELGIN: I understand. I just want to be clear on that, your Honor.

Q. They were actually talking about physical violence in front of you?

A. Yes. That if he came back on the premises there was going to be physical harm.

MR. ELGIN: I have no further questions, your Honor.

THE COURT: Anything further you wish to ask?

MR. OTTMAN: Yes, this statement about physical harm.

FURTHER RECROSS EXAMINATION BY MR.ROSEMAN:

Q. What was the day or the month that that statement was heard, could you tell us again?

A. Sir, I couldn't tell you, I had so many meetings and chronologically, to give you an exact time or date, I don't know.

THE COURT: If you don't know, sir, you may simply say you don't know. You don't have to go into long details.

Q. Would you know if it was in May or in June or July?

A., As I said, it had to be either the latter part of May or June.

Q. Did Mr. Hoai say if he had gone to the police to do anything about these alleged threats on his life?

A. No, he did not. In fact, I suggested that he do that.

Q. Asking about the business license now. You said that you saw a business license at the station in the name of Mr. Hoai? Did you --

THE COURT: You have to respond to that orally so we can pick up your words.

THE WITNESS: Yes. Yes. I'm sorry.

Q. Where was this license when you saw it?

A. It was on the wall in the sales office.

Q. Did you look at it closely to ascertain the exact name on the license?

A. No.

Q. Well, are you certain that it was Mr. Hoai's name on the license and not Mr. Vo's name.

A. I can't be exactly sure on that.

Q. So you are not able to say for certain that you saw a business license at the station in Mr. Hoai's name?

A. To be definite, no.

Q. It could have been Mr. Vo's name.

A.. It could have been, but I certainly knew that we have a retail sales tax number that we require from our franchisee and that number was given to me and that should be in your record because we have that.

MR. ROSEMAN: Nothing further, your Honor.

THE COURT: Anything further?

MR. ELGIN: Nothing, your Honor.

THE COURT: Thank you, sir, you may be excused.

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VAN VO,
D/B/A SUNTECH SUNOCO, INC.,
PLAINTIFF, CA NO. 7075-86
V.
THANH VONG HOAI
JOHN D. HEMENWAY,
DAVID HEMENWAY
AND SUN REFIING AND
MARKETING CO.,
DEFENDANTS.

TEMPORARY RESTRAINING ORDER

THIS MATTER IS BEFORE THE COURT ON THE MOTION OF PLAINTIFF,THANH VAN VO, DOING BUSINESS AS SUNTECH SUNOCO, INC. (HEREINAFTER "PLAINTIFF"), REQUESTING ISSUANE OF A TEMPORARY RESTRAINING ORDER.

UPON CONSIDERATION OF PLAINTIFF'S VERIFIED COMPLAINT, THE EXHIBITS THERETO, THE AFFIDAVITS, AND THE MOTION FOR A TEMPORARY RESTRAINING ORDER, TOGETHER WITH THE MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, AND AFTER HEARING TESTIMONY AND ARGUMENTS AND REPRESENTATIONS OF COUNSEL, IT APPEARING THAT PLAINTIFF HAS MET HIS BURDEN OF SHOWING

(1) THAT PLAINTIFF HAS MADE A STRONG SHOWING THAT HE IS LIKELY TO PREVAIL ON THE MERITS; (2) THAT PLAINTIFF WILL SUFFER IRREPARABLE HARM WITHOUT INJUNCTIVE RELIEF; (3) THAT DEFENDANTS WILL NOT BE SUBSTANTIALLY HARMED BY THE GRANT OF A PRELIMINARY INJUNCTION; AND (4) THAT THE PUBLIC INTEREST IS SERVED BY THE GRANT OF A PRELIMINARY INJUNCTION FOR THE REASONS STATED ON THE RECORD, WHICH ARE INCORPORATED HEREIN BY REFERENCE A TEMPORARY RESTRAINING ORDER SHOULD BE ISSUED TO PRESERVE THE RIGHTS OF THE PARTIES AND RESTORE THE STATUS QUO ANTE.

IT IS HEREBY ORDERED:

(1) THE DEFENDANTS JOHN HEMENWAY, DAVID HEMENWAY, THANH VON HOAI AND ALL PERSONS IN ACTIVE CONCERT OR PARTICIPATING WITH THEM SHALL IMMEDIATELY:

(A) CEASE AND DESIST FROM SELLING ANY PETROLEUM PRODUCTS, AUTO PARTS OR OTHER GOODS, PERFORMING ANY MECHANICAL OR OTHER

SERVICES, OR TRANSACTING ANY OTHER BUSINESS ON THE PREMISES OF THE SUNOCO STATION LOCATED AT 2305 PENNSYLVANIA AVENUE, S.E., WASHINGTON, D.C. 20020 (THE "STATION")

(B) RETURN POSSESSION AND OCCUPANCY OF THE STATION AND THE PROPERTY THEREON TO THE PLAINTIFF, AND

(C) CEASE THEIR INTERFERENCE WITH THE CONDUCT OF PLAINTIFFS BUSINESS AT THE SAID STATION.

(2) THAT THE DEFENDANT, SUN REFINING AND MARKETING COMPANY, SHALL CONTINUE TO SUPPLY THE PLAINTIFF WITH THE BRANDED PETROLEUM PRODUCTS AND TO PERMIT PLAINTIFF TO OPERATE THE STATION AND TO PERMIT HIM TO OCUPY THE STATION UNDER THE SAME TERMS AND CONDITIONS AS EXISTED BETWEEN PLAINTIFF AND SUN REFINING AND MARKETING COMPANY PRIOR TO AUGUST 25, 1986 AND PRODUCTS ARE TO BE DELIVERED SO LONG AS PLAINTIFF PAYS THE SUMS DUE FOR SAME.

THAT, AS A CONDITION OF GRANTING THIS TEMPORARY RESTRAINING ORDER, PLAINTIFF SHALL POST BOND IN THE AMOUNT OF $3,000 BY AUGUST 29, 1986, EASTERN STANDARD TIME WHICH AMOUNT SHALL REMAIN IN THE REGISTRY OF THE COURT UNTIL FURTHER ORDER OF THIS COURT.

THIS TEMPORARY RESTRAINING ORDER SHALL CONTINUE IN EFFECT ON SEPTEMER 8, 1986, UNLESS MODIFIED OR EXTENDED BY PRIOR ORDER OF THIS COURT

ORDERED THIS 29TH DAY OF AUGUST, 1986 AT 5:25 PM O'CLOCK, P.M.

/S/

ANNICE WAGNER

JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THANH VAN VO, d/b/a SUNTECH SUNOCO, INC., et al., Plaintiffs,	)	
V.	)	CA 7075-86
THANH VONG HOAI, et al. Defendants.	)	

CONSENT ORDER FOR EXTENSION OF TEMPORARY RESTRAINING ORDER AS TO DEFENDANT SUN REFINING AND MARKETING CO.

This matter having come before the court upon the pleadings and other papers heretofore filed herein and upon the representations of counsel and it appearing to the court that on August 29, 1986, a Temporary Restraining Order was issued in this cause on motion of plaintiff, Thanh Van Vo, after the hearing of testimony and arguments of counsel; and it further appearing that the plaintiff and Sun Refining and Marketing Company have, as evidenced by the endorsements hereon by counsel, agreed that the terms and conditions of the Temporary Restraining Order should be con-

tinued with respect to plaintiff and defendant Sun Refining and Marketing Company, until March 31, 1987 or the prior resolution of the dispute between plaintiff and defendant Thanh Vong Hoai over rights to operate the gasoline station at 2305 Pennsylvania Avenue, S.E., Washington, D.C. as a franchisee and lessee of Sun Refining and Marketing Company, so long as plaintiff complies with the terms and conditions of that certain one-year dealer trial franchise agreement appearing as Exhibit 1 to the Verified Complaint as if he were an original signatory thereto. A non-renewal of said agreement or a termination for failure to comply with the terms and conditions thereof will not be deemed a violation of this consent order. It is by the Court this 8th day of September, 1986,

ORDERED, that the following paragraph (2) of the Temporary Restraining Order of Au-

gust 29, 1986 is hereby extended as to the plaintiff and the defendant, Sun Refining and Marketing Company, so as to continue to maintain the status quo as between plaintiff and defendant Sun Refining and Marketing Company:

> (2) that the defendant, Sun Refining and Marketing Company, shall continue to supply the plaintiff with the branded petroleum products and to permit plaintiff to operate the station and to permit him to occupy the station under the same terms and conditions as existed between plaintiff and Sun Refining and Marketing Company prior to August 25, 1986. Such products are to be delivered so long as plaintiff pays the sums due for same.

and it is further ordered, that this extension shall continue until further order of this court or until March 31, 1987 or the prior resolution of the dispute pending in this cause between the plaintiff and defendant, Thanh Vong Hoai, over rights to operate the gasoline station at 2305 Pennsylvania Avenue, S.E., Washing-

ton, D.C., as a franchisee and lessee of Sun Refining and Marketing Company and so long as plaintiff continues to comply with the terms and conditions of that certain one-year dealer trial franchise agreement appearing as Exhibit 1 to the Verified Complaint as if it were an original signatory thereto, it being the sense of this consent order that a non-renewal of said agreement or a termination for failure to comply with the terms and conditions hereof will not be deemed a violation of this Consent Order;

AND IT IS FURTHER ORDERED, that a copy of said restraining order, together with a transcript of the court's reasons therefor stated on the record and incorporated into the temporary restraining order by refernce is attached to and made a part of this Consent Order;

AND IT IS FURTHER ORDERED, that the cash bond posted by plaintiff in the amount of

$3,000 shall remain in effect for the duration of the restraining order or until further order of the court.

This consent order shall not be construed to extend the said restraining order as to any other defendant.

/s/ Stephen F. Eilperin

Judge [stamp] 'Signed in Chambers'

Seen and agreed:

/s/ David C. Roseman per mfo
D.C. Bar No 226969
Jones, Day, Reavis & Pogue
1250 Eye Street, N.W., Suite 1100
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Attorney for Plaintiff

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Laurence A. Elgin, Esq.
2762 Woodley Place
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI	:	
PLAINTIFF,	:	C A NO. 87-2456
V.	:	
SUN REFINING AND	:	JUDGE OBERDORFER
MARKETING COMPANY,	:	
DEFENDANT.	:	

AFFIDAVIT OF JEFFREY W. WAGNER

STATE OF OKLAHOMA)
COUNTY OF TULSA)

I, JEFFREY W. WAGNER, BEING FIRST DULY SWORN ON OATH, DO DEPOSE AND STATE AS FOLLOWS:

1. I AM CURRENTLY A SENIOR ATTORNEY FOR SUN PIPE LINE COMPANY IN TULSA, OKLAHOMA. IN SEPTEMBER, 1986 I WAS COUNSEL TO THE FUELS DIVISION OF SUN REFINING AND MARKETING COMPANY LOCATED IN PHILADELPHIA, PENNSYLVANIA.

2. ON OR ABOUT SEPTEMBER 5, 1986, I WAS CONTACTED BY DAVID C. ROSEMAN, AN ATTORNEY WITH JONES, DAY, REAVIS & POGUE, WHO REPRESENTED THAN VAN VO IN A SUIT FILED AGAINST THANH VONG HOAI AND SUN REFINING AND MARKETING COMPANY IN THE SUPERIOR COURT

OF THE DISTRICT OF COLUMBIA. I CANNOT RECALL WHETHER THIS TELEPHONE CONVERSATION WAS MY FIRST NOTIFICATION OF THE SUIT. I DO KNOW, HOWEVER, THAT LOCAL COUNSEL HAD NOT BEEN RETAINED TO REPRESENT SUN REFINING AND MARKETING COMPANY IN THIS MATTER PRIOR TO THIS DATE.

3. DAVID ROSEMAN INFORMED ME THAT A TEMPORARY RESTRAINING ORDER HAD BEEN GRANTED BY JUDGE ANNICE WAGNER REINSTATING THANH VAN VO AS THE FRANCHISEE OF THE SUNOCO STATION LOCATED AT 2305 PENNSYLVANIA AVENUE, S.E. AND THAT THIS ORDER FURTHER REUIRED SUN TO CONTINUE SUPPLYING PETROLEUM PRODUCTS TO THE STATION. MR. ROSEMAN INQUIRED WHETHER SUN WOULD BE WILLING TO CONTINUE SUPPLYING PETROLEUM PRODUCTS TO THE STATION. MR. ROSEMAN INQUIRED WHETHER SUN WOULD BE WILLING TO CONSENT TO AN EXTENSION OF THAT PROVISION OF THE TEMPORARY RESTRAINING ORDER WHICH REQUIRED SUN TO CONTINUE TO SUPPLY PETROLEUM PRODUCTS UNTIL

FURTHER ORDER OF THE COURT IN LIEU OF PROCEEDING WITH A PRELIMINARY INJUNCTION HEARING.

4. I ADVISED MR. ROSEMAN THAT SUN COULD AGREE TO CONTINUE THAT PROVISION SO LONG AS WE WERE PAID FOR THE PRODUCTS DELIVERED AND SO LONG AS THE CONTINUATION WAS CONSISTENT WITH THE TERMS OF THE FRANCHISE AGREEMENT WHICH WAS THEN IN EFFECT.

5. MR. ROSEMAN TELECOPIED A DRAFT CONSENT ORDER FOR MY REVIEW WHICH CONTAINED A PROVISION FOR THE CONTINUATION OF SUPPLY OF PETROLEUM PRODUCTS TO THIS SUNOCO LOCATION. I DISCUSSED THE DRAFT ORDER WITH JOSEPH D. ZULLI, ESQ., MY SUPERIOR AT THAT TIME. I RECALL THAT WE MADE SOME CHANGES TO ENSURE THAT THE ORDER WAS CONSISTENT WITH THE FRANCHISE AGREEMENT AND THE PETROLEUM MARKETING PRACTICES ACT.

6. J. GORDON FORESTER, JR., OF THE FIRM OF POHORYLES & GREENSTEIN, P.C. HAD NOT BEEN RETAINED DURING THIS PERIOD OF NEGOTI-

ATIONS WITH MR. ROSEMAN AND CONSULTATION WITH MR. ZULLI. WHEN THESE NEGOTIATIONS WERE CONCLUDED, WE REALIZED THE NEED FOR LOCAL COUNSEL TO SIGN THE ORDER. I SUBSEQUENTLY CONTACTED MR. FORESTER AS HIS FIRM HAD PERFORMED SERVICES FOR SUN IN OTHER MATTERS, AND ADVISED HIM THAT WE HAD AGREED TO A CONSENT ORDER AND ASKED HIM TO SIGN THE ORDER AND ENTER HIS APPEARANCE ON BEHALF OF SUN. I SPECIFICALLY RECALL THAT I REQUESTED THAT HE REVIEW THIS CONSENT ORDER FOR FORM AND TO MAKE SURE THAT IT WAS CONSISTENT WITH LOCAL RULES. MR. FORESTER DID NOT PARTICIPATE IN ANY DISCUSSION REGARDING THE TERMS OF THE ORDER.

7. THE DECISION TO ENTER INTO THE CONSENT ORDER WAS SOLELY OURS AND THE TERMS WERE NEGOTIATED DIRECTLY WITH DAVID ROSEMAN. MR. FORESTER DID NOT COUNSEL SUN IN THIS DECISION NOR PARTICIPATE IN THE NEGOTIATIONS.

/S/: JEFFREY W. WAGNER

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
Civil Division

THANH VONG HOAI, et al., Plaintiffs	)
v.	) CA No. 89-2397
THANH VAN VO a/k/a Thoi Van Vo, et al., Defendants.	) (Oberdorfer, J.)

MOTION TO DISMISS
OF DEFENDANTS MILLARD F. OTTMAN, JR.
DAVID C. ROSEMAN,
AND JONES, DAY, REAVIS & POGUE

Defendants MILLARD F. OTTMAN, JR., DAVID C. ROSEMAN AND JONES, DAY, REAVIS & POGUE herby move this Court, pursuant to Rules 12(b)(5) and 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing the Complaint, as it pertains to them.

This motion is made upon the grounds that (a) plaintiffs have failed to effect proper service upon these moving defendants as required under Fed R. Civ. Pro. 4, and (2) the Complaint fails to state with respect to these defendants a

valid cause of action under 41 U.S.C. § 1983 or § 1985(3). This motion is based upon the Memorandum in support thereof, the affidavits of Millard F. Ottman, Jr., David C. Roseman, and Diane Ferguson, the Exhibits to the Roseman affidavit, and the pleadings already on file in this action.

Dated: November 29, 1989

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

BY:
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(202) 879-5487

Attorneys for Defendants
Millard F. Ottman, Jr.
David C. Roseman amd
Jones, Day, Reavis & Pogue

CERTIFICATE OF SERVICE

This is to certify that on this 29th day of November, I caused to be served, by first-class mail, copies of the foregoing Motion to Dismiss of Defendants Millard F. Ottman, Jr., David C. Roseman and Jones,

Day, Reavis & Pogue; Memorandum of Defendants Millard F. Ottman, Jr., David C. Roseman and Jones, Day, Reavis & Pogue in Support of Motion to Dismiss; Proposed Order Granting Motion to Dismiss; Affidavit of Millard F. Ottman, Jr.; Affidavit of David C. Roseman; Affidavit of Diane Ferguson; and Exhibits to the Roseman Affidavit, upon the following:

Laurence A. Elgin, Esq.
8929 Sleaford Place
Annandale, Virginia 22003,
Attorney for Plaintiffs,

John D. Hemenway, Esq.
4816 Rodman Street, N.W>
Washington, D.C. 20016

J. Gordon Forester, Esq.
Greenstein, Delorme & Luchs, P.C.,
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Washington, D.C. 20036-2400

Sun Refining and Marketing Co.,
c/o CT Corporation System
1025 Vermont Avenue, N.W.
Washington, D.C. 20005

Robert Pleshaw, Esq.
729 15th Street, N.W. Suite 800
Washington, D.C. 20005
Attorney for Defendant Thanh Van Vo.

/s/ Brian P. Maschler

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THANH VONG HOAI, et al.) Plaintiffs	)	
v.	)	CA No. 89-2397
THANH VAN VO a/k/a Thoi Van Vo, et al.	)	(Oberforfer,J.)
Defendants.	)	

MEMORANDUM OF DEFENDANTS MILLARD F. OTTMAN, JR., DAVID C. ROSEMAN, AND JONES, DAY, REAVIS & POGUE IN SUPPORT OF MOTION TO DISMISS

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MEMORANDUM OF DEFENDANTS MILLARD F. OTTMAN, JR., DAVID C. ROSEMAN, AND JONES, DAY, REAVIS & POGUE IN SUPPORT OF MOTION TO DISMISS

Defendants Millard F. Ottman, Jr., ("Ottman"), David C. Roseman ("Roseman") and Jones, Day, Reavis & Pogue ("Jones, Day") submit this memorandum in support of their motion, pursuant to Fed. R. Civ.

Pro. 12(b)(5) and 12(b)(6), to dismis this action. Dismissal is mandated because (1) plaintiffs have failed to effect proper service on any of these defendants under Fed. R. Civ. Pro. 4, and (2) the Complaint fails to state a valid cause of action against these defendants under either 42 U.S.C. § 1983 or § 1985(3).

PRELIMINARY STATEMENT

This case represents an exceptionally reckless misuse of the Civil Rights Act, and an abuse of judicial process. The Complaint's ad hominem rhetoric and conclusory recitation of statutory language aside, it appears that the sole basis alleged for plaintiffs' 42 U.S.C. §§ 1983 and 1985(3) claims is the completely lawful attainment of a temporary restraining order relating to the possession of a service station. As to these moving parties, the attorneys and law firm which secured this interim relief on behalf of their

client, defendant Thanh Van Vo ("Vo"), this purported basis for plaintiffs' Civil Rights Act claims, as a matter of law, is no basis at all.

The subject temporary restraining order was issued by the Superior Court of the District of Columbia in favor of Vo, pursuant to notice and over plaintiffs' vigorous opposition, approximately three years ago. The order, as it pertained to plaintiffs, expired by its own terms ten days after its issuance. (Temporary Restraining Order entered August 29, 1986, Exhibit A to Affidavit of David C. Roseman ("Roseman Aff."). The order was extended with respect to another party, Sun Refining and Marketing Co. ("Sun Refining") shortly before the expiration of the 10-day period. (Consent Order for Extension of Temporary Restraining Order As To Defendant Sun Refining and Marketing Company, Exhibit B to Roseman Aff.) That

consent order, which explicitly excluded plaintiffs and thus imposed no additional restraint upon them beyond that already prescribed by law, expired over two and a half years ago.

Despite not being parties to the consent order, plaintiffs filed an interlocutory appeal of the order, raising many of the same challenges that they raise in the instant case. (See Notice of Interlocutory Appeal and Appellant's Opening Brief, Exhibit C. to Roseman Aff.) The Court of Appeals for the District of Columbia dismissed the appeals of plaintiffs John D. Hemenway and David Hemenway as "frivolous", and later dismissed the appeal of plaintiff Hoai as moot.

Having been rebuffed in their efforts to overturn an expired consent order which did not even apply to them, and rather than pursue this original action to its

conclusion[1], plaintiffs have resorted to a strategy of proliferation of new actions against the parties to the first Superior Court action, asserting many of the same grievances unsuccessfully raised in that original action and interlocutory appeal (See pp. 5-11, below). Thus, the present action, which was filed three years to the day after the hearing on the motion for a temporary restraining order[2], must be

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[1] That action, Vo v. Sun Refining and Marketing Company, Superior Court of the District of Columbia, Civil Division, Civ. Act. No. 7075-86, is still pending, but has been placed on the suspense calendar at the urging of the plaintiffs in the present case. There has been no final ruling on the merits of Vo's claims in that action, nor on the counterclaim of Hoai and the Hemenways.

[2] The applicable limitations period for §1983 and 1985(3) claims is three years. See Wilson v. Garcia, 471 U.S. 261, 275-76 (1985) (holding that the statute of limitations for § 1983 claims is the statute applicable to personal injury actions in the state in which the § 1983 claim is brought); Hobson v. Brennan, 625 F. Supp. 459, 466 (D.D.C. 1985) (J. Oberdorfer, presiding) (a three-year limitation period applies to § 1983 claims brought in the District of Columbia.

viewed as merely another in a long series of attempts to resurrect plaintiffs' collateral challenge to a dead interlocutory order which was issued in a case that is still pending. In the present case, plaintiffs have added to the roster of parties the private law firm and two of its attorneys who successfully obtained the temporary restraining order on behalf of their client. But as plaintiffs must concede, these defendants were not parties to the earlier action, had no personal stake in the outcome of the dispute, and functioned solely as advocates for the interests of their client.

As a matter of law, such advocacy does not provide a legitimate basis for a claim under 42 U.S.C. § 1983 or § 1985(3). We demonstrate below that plaintiffs have failed to meet their most basic pleading requirements applicable to claims under these sections. Their § 1983 claim must

fail because, among other deficiencies, plaintiffs do not and cannot state facts sufficient to sustain a valid claim that the defendant law firm and attorneys acted "under color of law" in representing the interests of Vo, and plaintiffs do not and cannot properly allege that they were deprived of any federal right as a result of defendants' actions. Their § 1985 claim must fail because the Complaint fails to allege any invidious, class-based discrimination, which allegation is a prerequisite to bringing such a claim.

This action also must be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(5), inasmuch as plaintiffs have failed to execute proper service upon these moving defendants.

FACTS[3]

A. Background

1. The D.C. Superior Court Action and The Temporary Restraining Order

On August 28, 1986 Vo, represented by Jones, Day, and in particular Ottman and Roseman, filed a civil action in the@ [sic] Superior Court of the District of Columbia against Thanh Vong Hai [sic] ("Hoai"), John D. Hemenway, David Hemenway, and Sun Refining. Vo alleged in that action, inter alia, that Hoai and the Hemenways had wrongfully and forceably evicted Vo from his Sunoco Service Station on August 25, 1986. (See Superior Court Complaint and Motion for Temporary Restraining Order, Exhibit D to Roseman

---

[3] Jones, Day, Ottman and Roseman (collectively, "the Jones, Day defendants") respectfully request that, pursuant to Rule 201 of the Federal Rules of Evidence, the Court take judicial notice of earlier pleadings and court rulings concerning the subject matter of the instant dispute.

Aff.) Vo concurrently filed and served upon all defendants a motion for temporary restraining order. Id. On August 29, 1986, after a two-day evidentiary hearing before the Honorable Annice Wagner at which Vo, the Hemenways and several other witnesses testified, the Superior Court granted Vo's motion for a temporary restraining order. The order required, inter alia, that Hoai and the Hemenways return possession and occupancy of the station and all property thereon to Vo, and that Sun Oil continue to supply Vo with petroleum products and permit him to operate the service station under the terms of the existing franchise agreement between Vo and Sun Oil. (Exhibit B to Roseman Aff.)

No appeal from the TRO was taken by any defendant in that action. In light of his reinstatement to occupancy of the service station, Vo did not seek further in-

junctive relief against Hoai or the Hemenways, and the TRO expired with respect to them on September 8, 1986. In order to maintain the status quo with respect to the continued operation of the service station, Vo entered into a consent order with Sun Refining extending the temporary restraining order only as to Sun Refining. (Exhibit B to Roseman Aff.). The Consent Order was entered by the Superior Court on September 8, 1989. It expired, as did the temporary restraining order with respect to Sun Refining, on March 31, 1987.[4]

Hoai and the Hemenways, who were not parties to the consent order, nonetheless sought an interlocutory appeal of the order, challenging its validity. (Exhibit C to Roseman Aff.) The Court of Appeals for

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[4] The consent order was made expressly subject to the Superior Court's ultimate ruling on the merits of the dispute between Vo and Hoai. It was to expire on the earlier of the resolution of that dispute or March 31, 1987, the date the franchise agreement expired (Exhibit B).

the District of Columbia dimissed the appeal by Hoai and the Hemenways as frivolous (Exhibit E to Roseman Aff.)

In August, 1988, plaintiffs filed a third party complaint against the Jones, Day defendants among others, alleging, just as they do in the present action, that these defendants made misrepresentations to the Superior Court, and had extended the TRO without notice to Hoai. (See Answer, Counter-Claim and Third-Party Claims, at paras. 186-87, Exhibit G to Roseman Aff.) The third-party complaint further alleged that in committing these acts these defendants acted ultra vires the rules of the Superior Court. Id., para 188. Plaintiffs packaged these allegations as tortious interference with contract and business relationship, conspiracy, and violation of civil rights claims. Id., Counts 8-11, 13. This third party complaint was voluntarily dismissed

as to the Jones, Day defendants by plaintiffs after Superior Court Judge Weisburg informed them that under District of Columbia common law, in order to sue Jones, Day, plaintiffs would have to serve each individual partner of the firm.

As noted above, the Vo action is still pending.[5] It has been placed on the suspense calendar at the request of Hoai and the Hemenways while they pursue, in

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[5] Plaintiffs Hoai and the Hemenways moved to dismiss the Vo action, and for sanctions. The Superior Court denied those motions, noting as follows:

"In the court's view, if any party should be sanctioned under Rule 11, it is [Hoai and the Hemenways] have made a relatively simple case unnecessarily complicated, and by their filing of voluminous motions, many of which are particularly frivolous, and most of which are replete with inappropriate and irresponsible attacks against [Vo] and others, [Hoai and the Hemenways] have diverted this case off the Civil II calendar, where it belongs, requiring special assignment to a single judge for all purposes."

Order of July 26, 1985 [sic] at 5-6, attached as Exhibit H to Roseman Aff.

separate actions, parallel attacks on the same interlocutory ruling.

B. Other Actions

1. The RICO Action

On or about March 23, 1987 plaintiff Hoai filed a 133-page complaint against Vo and others in the United States District Court for the Eastern District of Virginia. That complaint alleged twenty-four counts, including, inter alia, ten counts brought under RICO, and one brought under 41 U.S.C. §§ 1983, 1985, 1986 and 1988. (RICO Complaint, attached as Exhibit I to Roseman Aff.) Most of the allegations of this complaint focused on the same ultimate issue -- concerning the right to the possession of the Sunoco service station -- that was at issue in the earlier Vo action that had been brought in the District of Columbia Superior Court. The Civil Rights Act claim set forth in Count XI of that complaint charged Vo and others

with "conspiring to file and filing false pleadings full of false allegations and by using fraud to deprive plaintiff of the assistance of his counsel." Id., para. 294. The complaint alleges that such conduct deprived Vo [sic] of the equal protection of the laws, in violation of 42 U.S.C. § 1985(3) -- just like the Complaint in the present action.

On July 2, 1987, the District Court for the Eastern District of Virginia entered an order dismissing the Complaint. (Order Dismissing RICO Complaint, Exhibit J to Roseman Aff.)

2. The Petroleum Marketing Practices Act ("PMPA") Action.

On or about September 5, 1987, Hoai filed in this Court an action under the PMPA against Sun Refining. (See Verified

Complaint, Exhibit K to Roseman Aff.)[6] This action also challenges the validity of the temporary restraining order entered in favor of Vo and the consent order. Id., at paras. 33-34. Defendant Sun Refining has filed a motion for summary judgment seeking a dismissal of all claims against it in this action, which motion is currently pending before the Court.

C. Plaintiffs' Allegations Against Jones, Day, Ottman and Roseman In the Present Action

The Complaint alleges that:

(a) the Jones, Day defendants "filed and obtained (sic) a motion for a TRO in the Superior Court of the District of Columbia" by use of affidavits "which they should have known were false" (Complaint,

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[6] Due to the pendency of this related action, whose relationship with the present case was noted to the Court by defendant Gordon S. Forester [sic] pursuant to Local Rule 405, the present case was reassigned to the Honorable Louis F. Oberdorfer.

para. 32), and by presenting at oral argument theories which were not included in any filing then before the Superior Court (Complaint, para. 33);

(b) Ottman obtained the TRO by "false statements to the Superior Court judge which statements were accepted as fact erroneously and incompetently by that judge" (Complaing, para 33);

(c) by "false charges," the Jones Day defendants deprived Hoai of "his right to a counsel of his choosing." (Complaint, para 34);

(d) by the use of false swearing and testimony, the Jones, Day defendants "deprived all of the plaintiffs of their freedom to travel in and in the vicinity of the gas station franchise in question and to operate the same," (Complaint, para 35);

(e) the Jones, Day defendants made false representations to SUNOCO in connection

with entering into the agreement which formed the basis for the consent order, (Complaint, para. 38);

(f) "defendants" (it is not clear whether these include the Jones, Day defendants) held out to the managers of the service station "that the Superior Court had required this result depriving Hoai of his station and franchise," (Complaint, para. 39); and

(g) the Jones, Day defendants "held out falsely" (as to whom the Complaint does not specify) that a TRO could be extended without notifying the major party in interest and without his consent," and "used the device of getting an unwitting judge to sign and ratify" the "voluntary agreement" between VO and Sun Refining. (Complaint, para, 43).

D. The Faulty Attempt At Service Upon Jones, Day, Ottman and Roseman

Plaintiffs' feeble attempt at service upon the Jones, Day defendants consisted solely of a process server's leaving copies of the Complaint and Summons at a reception desk of Jones, Day on November 9, 1989. See Returns of Service, attached as Exhibit L to Roseman Aff. As Ms. Diane Ferguson, the receptionist present at the desk on November 9, 1989, states in her affidavit, she was not authorized to accept service on behalf of any of these three defendants, and she expressly informed the process server of that fact. Affidavit of Diane L. Ferguson ("Ferguson Aff."), paras. 3,7. Ms. Ferguson further instructed the process server that, in any case, all deliveries to the firm had to be made to the firm's mailroom, located on another floor of the office. Id., para. 3. The process server simply ignored Ms. Ferguson's statements, left the documents on the desk, and departed. Id., para. 6.

On or about November 13, 1989, John Hemenway filed a document styled "Praecipe" with the Court in which he represented that service had been completed upon all defendants. This is patently false. No copies of these pleadings have ever been served directly upon Roseman or Ottman or anyone authorized to accept service for them, nor have any such documents reached their residences. Affidavit of Millard Ottman, para 1; Foseman Aff., para. 1. As to Jones, Day, these pleadings have not been served upon anyone authorized to accept them in the firm's behalf. Thus, not only was the service that <u>was</u> attempted on November 9, 1988 woefully defective as to the Jones, Day defendants, but Mr. Hemenway, an attorney, has completely fabricated a story regarding service, which appears in a signed pleading filed with this Court.

<u>ARGUMENT</u>

I. DISMISSAL OF THE COMPLAINT AS AGAINST THE ATTORNEY DEFENDANTS IS COMPELLED DUE TO INSUFFICIENT SERVICE OF PROCESS

Plaintiffs did not make valid service of process upon defendants as required under Rule 4 of the Federal Rules of Civil Procedure. Rule 4(d)(1) provides that service may be made upon an individual by delivering a copy of the summons and complaint "to the individual personally" or "by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process." (emphasis added). Rule 4(d)(3) provides that service may be made upon a partnership or other unincorporated association "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment

or by law to receive service of process ..."

It is plain that the attempted service upon the Jones, Day defendants by plaintiffs' messenger was not sufficient to effectuate service under Rule 4(d)(1). Service on a person or entity other than the defendant is effective under Rule 4(d)(1) only where that person or entity is specifically authorized to accept service on defendant's behalf. See Schwarz v. Thomas, 222 F.2d 305, 308 (D.C. Cir. 1955); 4A Wright and Miller, Federal Practice and Procedure, §§ 1097, 1098; 1 Moore's Federal Practice, para. 4.12. This authorization must come from the person upon whom service is to be made. Hardy v. O'Daniel, 16 F.R.D., 355, 356 (D.D.C. 1954); Bennett v. Circus U.S.A., 108 F.R.D. 142, 147 (N.D. Ind. 1985) ("there must be evidence of an actual appointment.").

Ms. Ferguson's affidavit recites that she had never been appointed or even asked to receive service of process on behalf of Jones, Day, Roseman or Ottman. Ferguson Aff., para. 7. Moreover, Ms. Ferguson's position as a receptionist at defendants' place of business did not automatically render her an agent for this purpose. In Larry M. Rosen & Associates, Inc. v. Hurwitz, 465 A. 2d 1114 (D.C. App. 1983), for example, the court held that service upon a receptionist in defendants' office, who was not authorized by defendants to accept service of process on their behalf, did not satisfy the requirements of Rule 4(d)(1), even though she was authorized to sign for and open all defendants' mail. Similarly, the courts have repeatedly held that service on secretaries or co-workers is not sufficient for purposes of Rule 4(d)(1), absent formal appointment or designation by law. Lensel Lopez v. Cor-

dero, 659 F. Supp. 889 (D. Puerto Rico 1987) (service upon official's secretary invalid where secretary was not an agent authorized by appointment to receive service of process); Betlyon v. Shy, 573 F. Supp. 1402, 1406 (D. Del. 1983) (same); Lamont v. Haig, 539 F. Supp. 552-57 (W.D.S.D. 1982) (same); Lavender-Cabellero v. Dep't of Consumer Affairs of the City of New York; 458 F. Supp. 213, 216 (S.D.N.Y. 1978) (merely dropping off a summons with a fellow employee is insufficient service of process absent evidence of authorization of fellow employee to accept service or representation by fellow employee that summons would be

delivered).[7]

Moreover, even if plaintiffs' messenger had delivered copies of the Summons and Complaint to Jones, Day's mailroom, see Ferguson Aff., para 3, this would still not have been proper service as to Ottman and Roseman. Delivery to a defendant's place of business does not fall within any of the categories under Rule 4(d)(1). See Leichtman v. Koons, 527 A.2d 745, 747 (D.C. App. 1987); Betlyon v. Shy, 573 F. Supp. at 1405. Thus, service of process on Jones Day would not have satisfied the requirements of Rule 4(d)(1) unless Ottman and Roseman had specifically designated Jones, Day as an agent to

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[7] That Ottman and Roseman eventually obtained a copy of the Summons and Complaint does not cure plaintiffs' defective service. Richards v. New York State Dep't of Corr. Services, 572 F. Supp. 1168, 1173 (personal service of summons upon a party through a co-employee does not constitute sufficient service unless the co-employee is an agent of the party to be served, even if summons shortly thereafter came into possession of party to be served).

receive service of process, which they did not. It follows, therefore, that the Complaint must be dismissed as to defendants Roseman and Ottman.

With respect to Jones, Day, leaving the Complaint and Summons with an unauthorized receptionist clearly did not effectuate service on the firm under Rule 4(d)(3). For the reasons already noted above, Ms. Ferguson was not "an officer, a managing or general agent" or other "agent authorized by appointment or by law to receive of process" on behalf on [sic] Jones Day. All counts against Jones Day should therefore be dismissed pursuant to Rule 12(b)(5).

II. THE COMPLAINT MUST BE DISMISSED AS AGAINST THE JONES, DAY DEFENDANTS BE CAUSE IT DOES NOT STATE A VALID CAUSE OF ACTION AGAINST THEM

Jones, Day, Ottman and Roseman have been sued in this case for successfully

representing the interests of their client, a private litigant, in a preliminary phase of a civil action. Plaintiffs - this time around - have framed their claims as Civil Rights Act violations. Even assuming the truth of all of plaintiffs' scurrilous charges against these moving parties, it is crystal clear that the allegations of the Complaint do not provide, as a matter of law, any valid basis for a claim under either § 1983 or u 1985(3).

We note at the outset that this Circuit has "articulated a heightened pleading standard demanding especial particularly [sic] in civil rights complaints." Thomas v. News World Communications, 681 F. Supp. 55, 67 (D.D.C. 1988) (J. Oberdorfer, presiding), citing Hobson v. Wilson, 737 F.2d 1 (D.D.C. Cir. 1984), cert denied, 470 U.S. 1084 (1985); see also Martin v. Malhoyt, 830 F.2d 237, 258 (D.C.

Cir.) reh'g denied, 833 F.2d 1049 (1987)[8] Accordingly, "complaints containing only 'conclusory,' 'vague,' or 'general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed . . . Diffuse and expansive allegations are insufficient . . . " Hobson v. Wilson, 737 F.2d at 30, quoting Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) (emphasis added). In the instant case, the complaint is a classic example of a "vague," "conclusory," "diffuse" and "general" pleading. Repetitive incantations of statutory language fill the document, but these are not supported by reference to material facts. Hobson v. Wilson, 737

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[8]8 This strict pleading standard, which applies to claims brought under both § 1983 and 1985(3), Thomas v. News World Communications, 681 F.Supp. at 67, n.3, has been adopted by "every other circuit." Hobson v. wilson, 737 F.2d at 30 and n.87. See also, Robinson v. McCorkle, 462 F.2d 111, 114 (3d Cir. 1972), cert. denied, 409 U.S. 1042 (1972); Del Signore v. City of McKeesport, 680 F.Supp 200, 203 (W.D. Pa. 1988), aff'd, 877 F.2d 54 (3d Cir. 1989).

F.2d at 30. Plaintiffs' failure to meet this pleading standard is itself fatal to their claims. The deficiencies of the pleading are all the more glaring in view of plaintiffs' failure to satisfy the substantive pleading requirements which govern the assertion of claims under §§ 1983 and 1985(3). These requirements are discussed below.

A. Count I Does Not State A Valid Claim Under 42 U.S.C. § 1983

There are two fundamental and uncompromising requirements that a plaintiff must meet in order successfully to invoke § 1983.[9] First, a plaintiff must plead

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[9] 42 U.S.C. § 1983 provides:

Every person who, under color or any statute, ordinance, regulation, custom or usae, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities ecured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for releases.

and prove that the defendant has deprived him of a right that is secured by the Constitution and laws of the United States. Hagans v. Lavine, 415 U.S. 528, 536 (1974); Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). Second, he must plead and prove that the defendant deprived him of such a right while acting "under color of state ... law." Gomez v. Toledo, 446 U.S. 635, 640 (1980); Adickes v. S.H. Kress & Co., 398 U.S. at 150, citing Monroe v. Pape, 365 U.S. 167, 184 (1961). Plaintiffs have not met either of these requirements, and therefore have failed to state a cognizable claim under § 1983. We turn first to the "under color of law" requirement.

1. The Complaint Does Not Plead Facts Sufficient To Support Plaintiffs' Conclusory Claim That Defendants Acted "Under Color Of State Law".

Generally, a person acts "under color of state law" only when his conduct allegedly causing the deprivation of a federal right is "fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1981); see also United States v. Classic, 313 U.S. 299, 326 (1941). The United States Supreme Court has recognized a two-part approach to the question of "fair attribution." "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by rule of conduct imposed by the State or by persons for whom the State is responsible . . . . Second, the party charged with the deprivation must be a person who may be fairly said to be a state actor." Lugar v. Edmondson Oil Co., 457 U.S. at 937. "Without a limit such as this," noted the Court, "private parties could face constitutional litigation whenever they seek to rely on some state rule

governing their interaction with the community surrounding them." Id., see also Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966) (the "color of law" test is difficult to satisfy in cases where the defendant is not a governmental official).

While the Complaint is liberally peppered with the phrase "under color and authority of the laws of the District of Columbia," plaintiffs have not alleged any legitimate grounds for attributing to the state the conduct of the defendant private attorneys and law firm. Reading between the lines of the Complaint, it appears that plaintiffs contend, in the alternative, that the Jones, Day defendants acted "under color of law" (1) merely by using the processes of the District of Columbia judicial system; or (2) by conspiring in some unspecified way with state judicial officials. Both of these hypothetical bases require a strained reading of the

complaint; neither is availing for the purposes of satisfying the "under color of law" requirement.

If plaintiffs' contention is that one becomes cloaked with the authority of the State when he uses the state judicial system, plaintiffs are mistaken. See Dahl v. Alvin, 630 F.2d 277, 280-81 (5th Cir. 1980), cert. denied, 451 U.S. 908 (1981) (a private party's use of a state's judicial system is not state action even though the judicial process itself is a state action). To begin with, attorneys are not officials of government solely by virtue of being attorneys. In re Griffiths, 413 U.S. 717, 729 (1973). Nor are they imbued with the authority of the State by virtue of being officers of the Court. Drum v. Nasuti, 648 F. Supp. 888, 896 (E.D. Pa. 1986) aff'd, 831 F.2d 286 (3rd Cir. 1987). "An attorney does not become a state actor merely by virtue of

instigating state court litigation," Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983), citing Lugar v. Edmondson Oil Co., 457 U.S. at 939.

Moreover, private attorneys "cannot be held liable under section 1983 for unilateral actions which they took on behalf of their clients." Drum v. Nasuti, 648 F. Supp. at 897. Id. Attorneys who participate in the trial of private state court litigation are not state functionaries acting under color of state law. Skolnick v. Martin, 317 F.2d 855, 857 (7th Cir. 1963). See also Barnard v. Young, 720 F.2d at 1189 (an attorney does not act under color of state law merely by using the device of a subpoena duces tecum). And, attorneys who represent private clients in civil actions where the state has no interest and where no state statute authorizes the attorney's conduct which is later complained of, do not act

under color of state law. Kovacs v. Goodman, 383 F.Supp. 507, 509 (E.D.Pa. 1974), aff'd, 515 F.2d 507 (3rd Cir. 1975).

These general principles were adopted and applied by the United States Supreme Court in Polk County v. Dodson, 454 U.S. 312 (1981). In that case, the Court held that even a public defender, who is paid by the State, does not act under color of state law when he exercises independent judgment in a criminal proceeding and performs a lawyer's traditional functions as counsel for defendants. Id. at 323. The Court noted:

> (I)t is often said that lawyers are 'officers of the court.' But the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of § 1983.

454 U.S. 318. Important to the Court's ruling was the fact that a public defender is "held to the same standards of com-

petence and integrity as a private lawyer," and that "a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." Id. at 321. Such independence from the influence of the State is even clearer in the present case, where the attorneys' representation of their client in no way involved either the participation, the financing, or the approval of the State. Indeed, the Complaint alleges that judicial officials became involved in the acts complained of only after the attorney defendants had already completed their functions as advocates -- i.e., after the motion for a temporary order had been argued, and after the consent order had been agreed upon by Vo and Sun Refining.

In sum, the allegations of the Complaint, fairly read, merely describe the actions of attorneys qua attorneys. Under

the authority cited above, such allegations are insufficient to meet the "under color of law" requirement of § 1983.

It is also important to note that plaintiffs allege that the attorney defendants' attainment of a temporary restraining order without notice to Hoai was in violation of the "law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia." Complaint para. 43. In Lugar v. Edmondson, the Court ruled that an allegation that the defendant acted contrary to state law precludes a claim that the defendant acted "under color of state law":

> Count two alleged that the deprivation of property resulted from respondents' 'malicious, wanton, willful, opressive [sic] unlawful acts.' By 'unlawful' petitioner apparently meant 'unlawful under state law.' To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did

> they have the authority of state officials to put the weight of the state behind their private decision, i.e., this case does not fall within the abuse of authority doctrine recognized in Monroe v. Pape, 365 U.S. 167 (1961) . . . Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.

457 U.S. at 940. In the present case, plaintiffs' allegation that defendants acted contrary to law (Complaint para. 43) is far more explicit than the one which proved dispositive in Lugar. Under the rule articulated in Lugar, Count I of the Complaint in this case "challenges only private action" and therefore must be dismissed.

Insofar as plaintiffs' "under color of law" recitations are grounded in some kind of conspiracy claim, such a claim must also fail. Private parties may be held liable under § 1983 if they conspire with state or local government officials to deprive others of their constitutional rights. See Adickes v. S.H. Kress & Co.,

398 U.S. at 152; Thomas v. News World Communications, 681 F. Supp. at 67. However, when a plaintiff alleges that a private person willfully participated in a joint action with a state official, he must plead and demonstrate that there existed between the private defendant and the state official an understanding, agreement, or conspiracy to deprive the plaintiff of a federal right. Drum v. Esute, 648 F. Supp. at 897. Merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge. Dennis v. Sparks, 449 U.S. 24, 28 (1980).

The "heightened pleading standard" articulated by this Circuit in Hobson v. Wilson applies with particular force where private parties are sued under § 1983 based upon an alleged conspiracy. 737 F.2d at 30. In the present case, the Com-

plaint does not contain any express allegations of judicial conspiracy. Paragraph 44 of the Complaint states only that "the defendants, and all of them, schemed and planned to evade this requirement and to instead use the very color of law and apparent authority of the Superior Court to deprive the plaintiff Hoai of those important rights . . . and of his property, the gas station." No particular facts of this alleged scheme appear anywhere in the Complaint. Such a vague and conclusory allegation runs squarely aginst the pleading standard set forth in Hobson, and thus cannot suffice as a basis for plaintiffs' "under color of law" averment.

In sum, plaintiffs have failed to state with the requisite particularity any cognizable basis for their conclusory contention that the attorney defendants, in representing the private interests of Vo, acted under color of state law. Moreover,

certain allegations of the Complaint completely foreclose such a contention.

2. The Complaint Does Not Properly Allege The Deprivation Of A Federal Right

Plaintiffs have failed to meet the second prong of the threshold pleading requirements applicable to § 1983 claims -- namely, alleging the deprivation of a federal right. See Samuels v. district of Columbia, 770 F.2d 184, 199 (D.C. Cir. 1985). Section 1983 does ot reach conduct that violates only state law. Baker v. McCollan, 443 U.S. 137, 142 (1979).

The deprivations that plaintiffs do allege are the following: (1) Hoai's right to occupy the service station; (2) John Hemingway's [sic] right to represent Hoai; (3) David Hemingway's [sic] right to work at the service station; (4) Hoai's right to counsel of his choosing; (5) plaintiffs' right to travel in the vicini-

ty of the service station; and (6) plaintiffs' due process right to notice of the consent order between Hoai [sic] and Sun Refining. These so-called "rights" either do not arise under federal law or the Constitution, or are so generally and conclusorily plead as to render them patently insufficient to support plaintiffs' § 1983 claim.

There is no federally-sanctioned "right" to operate a service station, to represent another in a judicial proceeding, to work at a service station, or to retain a particular attorney in a civil matter. See Thomas v. News World Communications, 681 F. Supp. at 66 (no action under § 1983 will lie for assault, defamation or libel because neither the Constitution nor other federal law establishes a right or privilege to be free from assault, defamation or libel). Plaintiffs' claim to a right of freedom to

travel within the vicinity of the service station likewise has no basis in federal law. The only federally recognized "right to travel" is that provided in Clause 1 of Section 2 of Article 4 of the Constitution. That section has been construed to provide that a Untied States citizen has the right to travel from one state and to take up residence in a state of his choice. E.g., Jones v. Helms, 452 U.S. 412, 418 (1981). Plaintiffs' claimed right to "travel within the vicinity of the service station" certainly does not come within this protection.

Due process is unquestionably a constitutional right, but plaintiffs have failed to plead facts sufficient to demonstrate that any conduct of the attorney defendants deprived plaintiffs of that right. Plaintiffs apparently allege that the agreement between Vo and Sun Refining gave rise to the consent order

and the court's signing of that order without notice to plaintiffs resulted in a deprivation of due process. Complaint, paras. 43-45. Such a contention is unavailing as a matter of law. As admitted in the Complaint, none of the plaintiffs was a party to this consent order; indeed, it explicitly excluded plaintiffs from its reach. Accordingly, the pendency of the consent order impaired no legal right of plaintiffs whatsoever. It did not, and does not, hinder plaintiffs from exercising any right they may have to pursue their claims and defenses in the Superior Court action, or for that matter, any other right they may have. Defendants did not, and could not, prevent plaintiffs from exercising their "right, if any there were, to challenge this third-party order. Plaintiffs appealed the consent order and

lost[10]. Similarly, defendants were not in a position to prevent plaintiffs from seeking to enjoin the operation of the consent order, a remedy available to them under Rule 65 of the Superior Court Rules, which is identical to the same federal rule. Plaintiffs failed to seek such a hearing.

Due process rights are not implicated where two private parties enter into a private agreement without providing notice to, or obtaining the consent of a non-party. The fact that the Superior Court approved the consent order did not alter its basic character. In short, the facts surrounding the consent order do not support plaintiffs' claimed deprivation of due process.

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10 Notably, the Complaint does not allege that the Court of Appeals for the District of Columbia acted in concert with defendants in denying plaintiffs' interlocutory appeal.

To the extent that plaintiffs' claims of deprivation of due process are based upon the attorney defendants' allegedly false statements to the District of Columbia Superior Court, (which is by no means clear from the Complaint), such claims are barred, as a matter of law, by the doctrine of absolute privilege. Communications made by an attorney during the course of and as part of a judicial proceeding are absolutely privileged, provided that the statements bear some relation to the proceeding. See Arneja v. Gildar, 541 A.2d 621, 623 (D.C. 1988); Mohler v. Houston, 356 A.2d 646, 647 (D.C. 1976) (attorneys protected from defamation actions by absolute privilege for statements made in the course of judicial proceedings). The absolute privilege from suit has been extended to actions filed under § 1983. E.g., Holt v. Casteneda, 832 F.2d 123, 125-26 (9th Cir. 1987),

cert. denied, 108 S.Ct. 1275 (1988); Katz v. Morgenthau, 709 F. Supp. 1219, 1232 (S.D.N.Y. 1989) (witnesses in adversarial hearing held to be absolutely immune from § 1983 actions).

The absolute privilege reflects the importance and necessity of the free flow of information during judicial proceedings. Creamer v. Danks, 700 F. Supp. 1169, 1171 (D. Me. 1988), aff'd, 863 F.2d 1037 (1st Cir. 1988). An attorney must be free to assert all relevant statements necessary to fully and strenuously to represent the interests of his client. Id.

In the present action, plaintiffs state that the allegedly false statements of the attorney defendants were made during the course of judicial proceedings and were directly related to that action. In light of the absolute privilege attaching to statements of counsel and the underly-

ing public policy against imposing barriers to zealous advocacy, the statements made by the attorney defendants in court cannot provide a valid basis for plaintiffs' § 1983 claim.

Finally, to the exten that the Hemenways' § 1983 claims are based upon the entry of the consent order, such claims are barred under the doctrine of collateral estoppel. Under this doctrine, "issues fully litigated between the parties in one action are conclusively determined therein and may not be relitigated in any subsequent action between the same parties or their privies." Hagans Management Co., Inc. v. Nichols, 409 A.2d 179, 181 (D.C. App. 1979); U.S. v. Lima, 424 A.2d 113, 116 (D.C. App.

1980).[11] This rule applies even though the cause of action for the relief sought in the subsequent action differs from that in the original suit. Goldkind v. Snider Bros., Inc., 467 A.2d 468, 473-74 (D.C. App. 1983); Adams v. Jonathan Woodner Co., 475 A.2d 393 (D.C. App. 1984). Furthermore, it is "beyond doubt that the defense of res judicata is available in a subsequent § 1983 action." Hernandez v. City of Lafayette, 699 F.2d at 736, citing Allen v. McCrory, 449 U.S. 90, 101 (1980).

As noted above, plaintiffs have already challenged the procedural validity of the consent order, in an interlocutory appeal to the District of Columbia Court of Appeals. (Exhibit C to Roseman Aff.) That court dismissed the appeal as frivo-

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[11] A Federal court asked to give res judicata effect to a state court judgment must apply the res judicata principles of the state whose decision is set up as a bar to further litigation. Hernandez v. City of Lafayette, 699 F.2d 734, 736 (5th Cir. 1983).

lous. (Exhibit E to Roseman Aff.) This dismissal pursuant to Rule 14 of the Rules of the District of Columbia Court of Appeals constitutes a conclusive ruling on the Hemenways' claims, which may later bar the assertion of the same arguments in a subsequent action. See Fletcher v. Vakas, 144 A.2d 105-106 (D.C. 1958) (dismissal of complaint for failure to state a cause of action constitutes an adjudication on the merits, barring litigation of the dismissed claims in a subsequent action).

Thus, since the Hemenways raised the issue of the validity of the consent order in their interlocutory appeal, and the District of Columbia Court of Appeals has already ruled that their challenge to the order was frivolous, the Hemenways are barred from re-raising this challenge in the present action. Their challenge to the consent order is no less frivolous now that it has been raised in another court,

under a different guise. Changing the label of these already-litigated claims does not entitle the Hemenways to relitigate the issue of the validity of the consent order.[12]

The foregoing reasons, plaintiffs may not sustain a valid claim under 42 U.S.C. § 1983. Accordingly, Count I of the Complaint must be dismissed, with prejudice.

B. Count II Fails to State A Valid Claim Under 42 U.S.C. § 1985(3)

Plaintiffs allege in Count Two of the Complaint that defendants conspired to deprive Mr. Hoai of his property rights "by the use of the consent order and al-

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12 As noted above, Hoai's claim that Vo's alleged false statements to the Superior Court deprived Hoai of the equal protection of the laws in violation of 42 U.S.C. § 1985(3) was previously raised in the RICO action, but conclusively rejected by the district court in dismissing that action. (Exhibit J to Roseman Aff.) Thus, Hoai, and arguably the Hemenways, are collaterally estopped from pursuing such a claim in the present action. (See discussion of Count II, below.)

legedly false testimony" in violation of 42 U.S.C. § 1985(3). (Complaint, para. 48). Once again, plaintiffs have failed to plead sufficient facts to support their claim. Section 1985(3) does not apply to all conspiratorial interferences with the rights of others, but is very limited in scope. It provides, in pertinent part:

> If two or more persons in ant [sic] State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The Supreme Court has interpreted the statute's intent requirement to mean that "there must be some racial, or perhaps otherwise class-based, indiviously discriminatory animus behind the conspirator's action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Accordingly, this Circuit has held that to state

a valid claim under § 1985(3), a plaintiff must allege:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons for the equal protection of laws . . . and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in her person or property or deprived of any right or privilege of a citizen of the United States.

Martin v. Malhoyt, 830 F.2d 237, 258 (D.C. Cir. 1987), citing Hobson v. Wilson, 737 F.2d at 14.

In the present case the Complaint alleges that defendants' actions constituted an "invidious discrimination," at para. 48, but does not state that such actions were motivated by a racial or any other class-based animus. Under Griffin, and

Martin v. Malhoyt, this omission is fatal to Count II.[13] "Rightful franchise holders," Complaint, para. 48, do not constitute a "class" whose interests are protected under § 1985(3).

Finally, plaintiffs' failure to state the exact nature of the discrimination of which they complain runs afoul of the heightened specificity requiement governing the pleading of civil rights actions, Hobson v. Wilson, 737 F.2d 1, and thus also compels a dismissal of Count II. In Hobson, the court stated:

> In cases involving a claim that the defendant acted with an unconstitutional motive, we will require that nonconclusory allegations of evidence of such intent must be present in a complaint.

---

[13] It appears, in contrast, that plaintiffs imply that the alleged discrimination was motivated by purely economic reasons. Yet the Supreme Court has expressly declined to interpret § 1985(3) to encompass conspiracies motivated by commercial or economic animus. United Brotherhood of Carpenters v. Scott, 463 U.S. 825, 836-39 (1983).

Id., at 29. See also Martin v. Malnoyt, 830 F.2d at 258 ("unsupported factual allegations which fail to specify in detail the factual basis necessary to enable [defendants] to intelligently prepare their defense will not suffice to sustain a claim of governmental conspiracy."); Thomas v. News World Communications, 681 F. Supp. at 67.

Given the Complaint's failure to allege a class-based animus, or to allege facts with sufficient particularity to support a claim of conspiracy or of invidious discrimination, Count II must be dismissed, with prejudice.

CONCLUSION

For the foregoing reasons, defendants Jones Day, Ottman and Roseman respectfully request this Court to issue an order dismissing, with prejudice, the Complaint as it pertains to them.

Dated: November 29, 1989

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

BY: Francis X. Markey (No 387678)
Brian P. Maschler
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-5497

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U.S.DISTRICT COURT
USDC DISTRICT OF COLUMBIA (WASHINGTON)
CIVIL DOCKET FOR CASE # 887-CV-2456

(JUNE 12, 1991 THRU OCTOBER 3,1991)

HOAI . SUN REFINING/MARKETING
ASSIGNED TO: JUDGE LOUIS F. OBERDORFER
REFERRED TO: MAGISTRATE PATRICK J. ATTRIDGE
DEMAND: $30,000 (SIC)
LEAD DOCKET: NONE
DKT# IN OTHER COURT: NONE
FILED: 9/8/87
JURY DEMAND: PLAINTIFF
NATURE OF SUIT: 890
JURISDICTION: FEDERAL QUESTION

THANH VONG HOAI PLAINTIFF	LAURENCE A. ELGIN [COR] 2762 WOODLEY PLACE WASHINGTON, DC 20008 (202) 628-1114 JOHN DAVID HEMENWAY [COR LD NTC] 4816 RODMAN STREET,NW WASHINGTON, D.C. 20016 (202) 244-4819 S. CHURCHILL ELMORE [COR NTC] 805 15TH STREET, NW SUITE 600 WASHINGTON, DC 20005 (202) 626-4082
V.	
SUN REFINING AND MARKETING CO.,INC.	JOHN GORDON FORESTER, JR. [COR LD NTC] GREENSTEIN, DELORME &

DEFENDANT LUCHS
1620 L STREET, NW
SUITE 900
WASHINGTON, D.C. 20036
(202) 452-1400

* * * *

DATE	DKT#	ACTION
6/12/91	---	PRE-TRIAL CONFERENCE BEFORE JUDGE LOUIS F. OBERDORFER FURTHER PRETRIAL CONFERENE SET FOR JUNE 14, 1991, 3:15PM; TRIAL TO COMMENCE ON JUNE 20, 1991 REPORTER T. DOURIAN (MON)
6/12/91	311	ORDER (COPY) FILED IN USCA 6/12/91 DENYING THE PETITION FOR A WRIT OF MANDAMUS
6/13/91	318	NOTICE OF FILING BY DEFENDANT'S SUN REFINING/ MARKETING STATEMENT OF

MATERIAL FACTS IN GENUINE ISSUE; EXHIBITS (3) (BLJ)

[ENTRY DATE 06/14/91]

6/14/91 317 ORDER BY JUDGE LOUIS F. OBERDORFER: PRETRIAL CONFERENCE SET FOR 2:45 6/24/91; TRIAL SET FOR JUNE 20, 1991 IS CONTINUED TO A DATE TO BE SCHEDULED. (N) (MON)

6/17/91 319 NOTICE OF FILING BY DEFENDANT SUN REFINING/MARKETING OF CORRECTED PRETRIAL STATEMENT WHICH CORRECTLY IDENTIFIES THE FILING PARTY AS DEFENDANT. ATTACHMENT (AJR) [ENTRY DATE 06/19/91]

6/19/91 320 RESPONSE BY DEFENDANT SUN

REFINING/MARKET IN OPPOSI- TION TO PLAINTIFF'S MOTIN TO STRIKE DEFENDANT'S EXPERT WITNESS [309-1] BY THANH VON HOAI; ATTACHMENTS (2) (BLJ) [ENTRY DATE 06/25 91]

6/19/91 321 PRETRIAL STATEMENTS (SUP- PLEMENTAL) BY DEFENDANT SUN REFINING/MARKET (BLJ) [ENTRY DATE 06/21/91]

6/21/91 322 NOTICE TO TAKE DEPOSITION BY PLAINTIFF THANH VONG HOAI; OF MR. DAVID ROSEMAN, AND MR. MILLARD OTTMAN (BLJ) [ENTRY DATE 06/26/91]

6/24/91 -- PRE-TRIAL CONFERENCE BEFORE JUDGE LOUIS F. OBERDORFER

REPORTER: TOM DOURIAN (MON)

6/24/91 325 MOTION BY THANH VONG HOAI FOR RECONSIDERATION AND CORRESPONDING TIME EXTENSION WITH REGARD TO DOCUMENTS AND INTERROGATORY ANSWERS FOR DEFENDANT (BM) [ENTRY DATE 07/02/91]

6/24/91 326 MOTION BY THANH VONG HOAI FOR RECONSIDERATION OF THE MAGISTRATE'S RULING WITH REGARD TO PLAINTIFF'S PROPOSED EXPERT WITNESSES; ATTACHMENT (BM) [ENTRY DATE 007/20/91]

6/24/91 327 MOTION BY THANH VONG HOAI FOR RECONSIDERATION OF THE MAGISTRATE'S RULING DENY-

ING PLAINTIFF'S MOTION TO
COMPEL COMPLETE AND TRUTHFUL
RESPONSES FROM
A WITNESS; ATTACHMENT (BM)
[ENTRY DATE 07/02/91]

6/24/91 328 MOTION BY THANH VON HOAI
FOR RECONSIDERATION OF THE
MAGISTRATE'S RULING DENYING
PRODUCTION OF DOCUMENTS FROM
DEFENDANT; ATTACHMENT.
(BM) [ENTRY DATE 07/02/91]

6/24/91 329 MOTION BY THANH VONG HOAI
FOR RECONSIDERATION OF THE
MAGISTRATE'S RULING WITH
REGARD TO PLAINTIFF'S
MOTION TO COMPEL ANSWERS
TO INTERROGATORIES; ATTACH-
MENT (BM) [ENTRY DATE 07/02/91]

6/27/91 330 RESPONSE BY DEFENDANT SUN REFINING/MARKET IN OPPOSI- TION TO MOTION FOR RECON- SIDERATION OF THE MAGIS- TRATE'S RULING WITH REGARD PLAINTIFF'S PROPOSED EXPERT WITNESSES [326-1] BY THANH VONG HOAI (AJR) [ENTRY DATE 07/08/91]

6/27/91 331 RESPONSE BY DEFENDANT SUN REFINING/MARKET IN OPPOSI- TION TO MOTION FOR RECON- SIDERATION AND CORRESPOND- ING TIME EXTENSION WITH RE- GARD TO DOCUMENTS AND INTERROGATORY ANSWERS FOR DEFENDANT [325-1] BY THANH VONG HOAI (AJR) [ENTRY DATE 07/08/91]

6/27/91 336 ORDER BY JUDGE LOUIS F. OBERDORFER: DENYING MOTION TO SHOW CAUSE FOR FAILURE TO COMPLY WITH COURT ORDER OF MARCH 18, 1991 [307-1] BY THANH VONG HOAI; DIRECTING THE JUDGMENT FOR THE DEFENDANTS AGAINST PLAINTIFF'S COUNSEL IN THE AMOUNT OF $50.00 (N) (KS) [ENTRY DATE 07/10/]

6/27/91 337 ORDER BY JUDGE LOUIS F. OBERDORFER; DENYING MOTION FOR RECONSIDERATION OF THE MEMORANDUM AND ORDER DENYING SUMMARY JUDGMENT ENTERED 6/3/91 ON AN EXPEDITED BASIS [310-1] BY

THANH VONG HOAI, DENYING MOTION IN LIMINE FOR RULINGS EXCLUDING EX POST

FACTS DOCUMENTS AND LINES OF TESTIMONY [276-1] BY THANH VONG HOAI (N) (KS) [ENTRY DATE 07/10/91]

6/28/91 324 ORDER BY JUDGE LOUIS F. OBERDORFER; DENYING MOTION TO STRIKE DEFENDANT'S EXPERT WITNESS [309-1] BY THANH VONG HOAI DISCOVERY DUE 7/23/91; PRETRIAL CONFERENCE SET FOR 1:45 9/16/91; TRIAL SET FOR 10:00 10/7/91; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DUE 8/1/91; PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT DUE 8/20/

91 SHOW CAUSE HEARING SET
FOR 7/8/91; (N) (MON)

6/28/91 332 RESPONSE (SUPPLEMENTAL) BY
PLAINTIFF THANH VONG HOAI
TO REQUEST FOR PRODUCTION
OF DOCUMENTS; ATTACHMENTS
(9) (CLV) [ENTRY DATE 07/
10/91]

6/28/91 333 MOTION BY PLAINTIFF THANH
VONG HOAI FOR PROTECTIVE
ORDER (CLV) [ENTRY DATE
07/10/91]

6/28/91 334 SUPPLEMENTAL MEMORANDUM TO
MOTION FOR RECONSIDERATION OF THE
MAGISTRATE'S RULING
WITH REGARD TO PLAINTIFF'S
MOTION TO COMPEL ANSWERS TO
INTERROATORIES [329-1] BY

THANH VONG HOAI (CLV) [ENTRY DATE 07/10/91]

6/28/91 335 ANSWER (SUPPLEMENTAL) BY PLAINTIFF THANH VONG HOAI TO INTERROGATORIES (CLV)
[ENTRY DATE 07/10/91]

7/2/91 338 SUPPLEMENT TO RULE 26(B)(4) STATEMENT FILED BY DEFENDANT SUN REFINING/MARKET.
ATTAHMENT (AJR) [ENTRY DATE 07/10/91]

7/2/91 339 RESPONSE BY PLAINTIFF THANH VONG HOAI TO THE COURTS REQUEST TO SHOW CAUSE;
ATTACHMENT (KMK)[ENTRY DATE 07/11/91]

7/8/91 340 RESPONSE BY PLAINTIFF THANH

VONG HOAI TO ORDER DISCOVERY DUE 7/23/91;

PRETRIAL CONFERENCE SET FOR 1:45 9/16/91; TRIAL SET FOR 10:00 10/7/91; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DUE 8/20/91 SHOW CAUSE HEARING SET FOR 7/8/91;

[324-1] ORDER [324-2]. ATTACHMENT (AJR) [ENTRY DATE 07/11/91]

7/10/91 341 NOTICE TO TAKE DEPOSITION BY DEFENDANT SUN REFINING/ MARKET OF PLAINTIFF THANH VONG HOAI (AJR) [ENTRY DATE 07/12/91]

7/10/91 342 REQUEST BY DEFENDANT SUN REFINING/MARKET TO PLAINT- IFF THANH VONG HOAI FOR

PRODUCTION OF DOCUMENTS.
(AJR) [ENTRY DATE 07/12/91]

7/10/91 343 MOTION BY DEFENDANT SUN REFINING/MARAKET FOR SUMMARY JUDGMENT ON THE EXEMPLARY DAMAGES; EXHIBITS (6) (MF) [ENTRY DATE 007/12/92]

7/11/91 344 DEPOSITION OF RODNEY SISK TAKEN FOR DEFENDANT SUN REFIING/MNARKET ON 6/12/91 [ENTRY DATE 07/12/91]

7/12/91 345 SUPPLEMENTAL MEMORANDUM BY DEFENDANT IN OPPOSITION TO APPEAL OF THE MAGISTRATE'S RULING WITH REGARD TO DENIAL OF ADDITIONAL EXPERT WITNESSES [326-1] BY THANH VONG HOAI (CPJ) [ENTRY DATE

07/15/91]

7/12/91 346 MOTION BY DEFENDANT SUN REFINING/MARKET TO AMEND THE SUPPLEMENTAL PRETRIAL ORDER (JDA) [ENTRY DATE 007/16/91]

7/22/91 347 MOTION BY DEFENDANT SUN REFINING/MARKET TO ADMIT COMPUTERIZED MONTHLY TOTALS OF GASOLINE SOLD TO THE SUN STATION; ATTACHMENTS (CLV) [ENTRY DATE 07/21/91]

7/23/91 348 MOTION BY PLAINTIFF THANH VONG HOAI TO COMPEL DISCOV- ERY OF IN-FORMATIN ESSENTIAL FOR COMPLIANCE WITH COURT ORDER OF 6/28/91 (CJP) [ENTRY DATE 07/24/91]

7/25/91 349 MOTION BY DEFENDANT SUN
REFINING/MARKET FOR SUMMARY JUDGMENT ON
THE LIMITATION
OF DAMAGES FROM 9/8/86 TO
4/27/87; EXHIBITS (9) (CPJ)
[ENTRY DATE 07/30/91]

7/31/91 350 MEMORANDUM BY SUN REFINING/
MARKET IN OPPOSITION TO
MOTION TO COMPEL DISCOVERY OF INFORMA-
TION ESSENTIAL
FOR COMPLIANCE WITH COURT
ORDER OF 6/28/91 [348-1] BY
THANH VONG HOAI (BM) [ENTRY DATE
08/01/91]

8/1/91 351 ORDER BY MA/JUDGE PATRICK
J. ATTRIDGE: DIRECTING
DEFENDAT TO REQUEST FROM
ITS FORMER EMPLOYEE LINDA

FIDEL-GRAHAM TO VOLUNTARILY APPEAR NO LATER THAN 8/16/91 FOR A DEPOSITION BY COUNSEL FOR THE PLAINTIFF;

IF DATE IS NOT AGREEABLE TO THE WITNESS, THE DEFENDANT SHALL PROVIDE THE PLAINTIFF BY 8/10/91 WITH THE WITNESS' LAST KNOWN RESIDENCE AND BUSINESS ADDRESS; (N) (CLV) [ENTRY DATE 08/02/91]

8/5/91 352 MOTION BY PLAINTIFF THANH VONG HOAI TO EXTEND TIME TO 8/16/91 TO REPLY TO DEFENDANT'S MOTION TO ADMIT COMPUTERIZED MONTHLY TOTALS OF GASOLINE SOLD TO THE SUN STATION (CPJ) [ENTRY DATE 08/07/91]

8/5/91 353 RESPONSE BY PLAINTIFF THANH VONG HOAI IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON THE EXEMPLARY DAMAGES [343-1] BY SUN REFINING/ MARKET, AFFIDAVITS (3), ATTACHMENTS (CJP) ENTRY DATE 08/07/91]

8/5/91 354 MOTION BY PLAINTIFF THANH VONG HOAI FOR LEAVE TO FILE TO RESPOND OUT OF TIME TO MOTION OF DEFENDANT TO AMEND THE SUPPLEMENTAL PRE- TRIAL ORDER (CJP) [ENTRY DATE 08/13/91]

8/12/91 355 NOTICE OF FILING BY PLAINTIFF THANH VONG HOAI OF COMPLIANCE WITH

MAGISTRATE'S ORDER OF
8/1/91 (CJP) [ENTRY DATE
08/13/91]

8/12/91 356 RESPONSE BY PLAINTIFF THANH VONG HOAI TO DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS (AJR) [ENTRY DATE 08/13/91]

8/12/91 357 NOTICE OF FILING BY PLAINTIFF THANH VONG HOAI OF COPIES OF DOCUMENTS NECESSARY FOR A COMPREHENSIVE EVALUATION OF PLAINTIFF'S OPPOSITION TO SUMMARY JUDGMENT ON EXEMPLARY DAMAGES. ATTACHMENT (AJR) [ENTRY DATE 08/13/91]

8/15/91 358 MOTION BY PLAINTIFF THANH VONG HOAI FOR A JUDICIAL ESTOPPEL AGAINST DEFEND- ANT'S CHANGE OF POSITION ON THE QUESTION OF VO'S PRESENCE IN THE STATION, AND, UNDER FRCIVP 56(F) FOR FURTHER DOCUMENT DIS- COVERY INTERROGATORIES AND TESTIMONY BY SUN PERSONNEL EXHIBITS (5) (AJR) [ENTRY DATE 08/16/ 91]

8/16/91 359 RESPONSE BY DEFENDANT SUN REFINING/MARKET IN OPPO- SITION TO MOTION TO ADMIT COMUTERIZED MONTHLY TOTALS OF GASOLINE SOLE TO THE SUN STATION [347-1] BY SUN RE- FINING/MARKET (CPJ) [ENTRY DATE 08/20/91]

8/20/91 360 RESPONSE BY DEFENDANT SUN
REFINING/MARKET IN OPPO-
SITION TO MOTION FOR A JUDICIAL
ESTOPPEL AGAINST
DEFENDANT'S CHANGE OF POSI-
TION ON THE QUESTION OF
VO'S PRESENCE IN THE STA- TION, AND,
UNDER FRCIVP 56(F) FOR FURTHER DOCU-
MENT
DISCOVERY, INTERROGATORIES
AND TESTIMONY BY SUN PER-
SONNEL [358-1] BY THANH VONG HOAI
(CJP) [ENTRY
DATE 008/21/91]

8/20/91 361 RESPONSE BY PLAINTIFF THANH
VONG HOAI IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

ON THE LIMITATION OF DAMAGES FROM 9/8/86 TO 4/17/91 P349-1] BY SUN
REFINING/MARKET; ATTAHMENT
(CJP) [ENTRY DATE 08/21/91]

8/22/91 362 MOTION BY DEFENDANT SUN
REFINING/MARKET TO COMPEL
DISCOVERY-PRODUCTION OF
DOCUMENTS; ATTACHMENT (DOT)
[ENTRY DATE 08/23/91]

8/27/91 363 NOTICE OF FILING BY PLAINT-IFF THANH VONG HOAI OF
STATEMENT OF GENUINE ISSUES
II FOR CONSIDERATION WITH
HIS OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY
DEFENDANT FOR A LIMIT ON
COMPENSATORY DAMAGES (AJR)
[ENTRY DATE 09/03/91]

8/27/91 364 REPLY BY DEFENDANT SUN
REFINING/MARKET TO RESPONSE
TO MOTION FOR SUMMARY JUDG-
MENT ON THE LIMITATION OF
DAMAGES FROM 9/8/86 TO
4/27/87 [349-1] BY SUN
REFINING/MARKET (AJR) [ENTRY DATE
09/03/91]

8/30/91 369 RESPONSE BY PLAINTIFF THANH
VONG HOAI IN OPPOSITION TO
MOTION TO AMEND THE SUPPLE-
MENTAL PRETRIAL ORDER [346- 1] BY SUN
REFINING/MARKET
(AJR) [ENTRY DATE 09/03/91]

9/3/91 365 ORDER BY JUDGE LOUIS F.
OBERDORFER: DENYING MOTION
FOR RECONSIDERATION OF THE
MAGISTRATE'S RULING WITH

REGARD TO PLAINTIFF'S PROPOSED EXPERT WITNESSES

[326-1] BY THANH VONG HOAI (N) (MON)

9/3/91 366 ORDER BY JUDGE LOUIS F. OBERDORFER: DENING MOTIN FOR RECONSIDERATION OF THE MAGISTRATE'S RULING WITH REGARD TO PLAINTIFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES [329-1] BY THANH VONG HOAI (N)(MON)

9/3/91 367 ORDER BY JUDG LOUIS F. OBERDORFER: DENYING MOTION FOR RECONSIDERATION OF THE MAGISTRATE'S RULING DENYING PRODUCTION OF DOCUMENTS FROM DEFENDANT [328-1] BY THANH VONG HOAI (N) (MON)

9/3/91 368 ORDER BY JUDGE LOUIS F. OBERDORFER: DIRECTING PARTIES TO FILE NO FURTHER MOTIONS PRIOR TO TRIAL WITHOUT LEAVE OF THE COURT (N)(MON)

9/5/91 370 RESPONSE BY PLAINTIFF THANH VONG HOAI MOTION TO COMPEL DISCOVERY-PRODUCTION OF DOCUMENTS [362-1] BY SUN REFINING/MARKET; ATTACH- MENTS (5) (CLV)[ENTRY DATE 09/06/91]

9/9/91 371 REQUEST BY PLAINTIFF THANH VONG HOAI FOR AMENDMENTS AND ALTERATIONS TO THE PRE-TRIAL ORDER; (5 REQUESTS) (CLV) [ENTRY DATE 09/10/91]

9/10/91 372 ORDER BY JUDGE LOUIS F. OBERDORFER: SUMMARY JUDGMENT HEARING SET FOR 1:45 9/16/91; (N)(MON)

9/10/91 373 TRANSCRIPT OF PROCEEDINGS FILED FOR DATE OF 6/12/91 REPOTER: T. DOURIAN (CLV) [ENTRY DATE 09/11/91]

9/10/91 374 TRANSCRIPT OF PROCEEDINGS FILED FOR DATE OF 6/24/91 REPORTER: T. DOURIAN (CLV) [ENTRY DATE 09/11/91]

9/13/91 375 MOTION BY PLAINTIFF THANH VONG HOAI FOR LEAVE TO FILE MOTION FOR THE ADDITION OF A WITNESS EXHIBIT (MOTION) (SJP)(ENTRY DATE 09/18/91]

9/16/91 --- PRE-TRIAL CONFERENCE BEFORE
JUDGE LOUIS F.OBERDORFER
REPORTER: T. DOURIAN (CLV)
[ENTRY DATE/ 09/18/91]

9/16/91 376 MEMORANDUM AND ORDER BY
JUDGE LOUIS F. OBERDORFER
GRANTING MOTION OF DEFEND- ANT ON
LIMITATION OF DAMAGES; (N) (CLV)
[ENTRY DATE 09/18/91]

9/16/91 377 ORDER BY JUDGE LOUIS F.
OBERDORFER: GRANTING MOTION
OF DEFENDANT TO COMPEL PRO-
DUCTION OF TAX RETURNS;
DIRECTING PLAINTIFF TO PRO-
VIDE CERTAIN DOCUMENTS AND
TO SIGN INFORMATIN AUTHORI-
ZATION FORMS BY 9/20/91;
DIRECTING DEFENSE COUNSEL
TO USE DOCUMENTS ONLY FOR

TRIAL IN THIS CASE; (N) (CLV)

[ENTRY DATE 09/18/91]

9/24/91 378 ORDER BY JUDGE LOUIS F. OBERDORFER: DENYING MOTION FOR A JUDICIAL ESTOPPEL AGAINST DEFENDANT'S CHANGE OF POSITION ON THE QUESTION OF VO'S PRESENCE IN THE STATION, AND, UNDER FRCIVP 56(F) FOR FURTHER DOCUMENT DISCOVERY, INTERROGATORIES AND TESTIMONY BY SUN PESONNEL [358-1] BY THANH VONG HOAI; DENYING PLAINTIFF'S FIRST, SECOND, FOURTH AND FIFTH REQUESTS TO AMEND COURT'S PRETRIAL ORDER; GRANTING IN PART AND DENYING IN PART PLAINTIFF'S THIRD REQUEST TO AMEND

COURT'S PRETRIAL ORDER;
RETAINING UNDER ADVISEMENT
DEFENDANTS' SUMMARY JUDG-
MENT MOTION ON THE ISSUE OF
EXEMPLARY DAMAGES; RESERVING
FOR TRIAL DEFEND-
ANT'S MOTION TO ADMIT COM-
PUTERIZED RECORDS; GRANTING
PLAINTIFF'S ORAL MOTION TO ADMIT PERCY
PETTAWAY TO
WITNESS LIST; GRANTING
DEFENDANTS' MOTION TO ADD
MANU VAKHARIA TO WITNESS
LIST. (N) (MON)

9/24/91 379 ENTERED IN ERROR MOTION BY
PLAINTIFF THANH VONG HOAI
FOR THE ADDITION OF A WIT-
NESS, RICHARD K. AGNEW TO
BE ADDED TO THE LIST OF
WITNESSES, ATTACHMENT (CLV)

[ENTRY DATE 09/27/91][EDIT
DATE 09/27/91]

9/24/91 380 NOTICE TO TAKE DEPOSITION
BY PLAINTIFF THANH VONG HOAI OF MAN-
HARLAL VAKHARIA
ON 9/27/92 (CLV) [ENTRY
DATE 09/27/91]

9/24/91 381 MOTION BY PLAINTIFF THANH
VONG HOAI FOR LEAVE TO FILE MOTION TO
ADD WITNESS,
EXHIBIT (MOTION) (CLV)
[ENTRY DATE 09/27/91]

* * * *

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA

90-7170 [STAMP]

APPEAL FROM THE DISTRICT COURT

Bin # 26,4

Briefs Sent: 4-9-91

Thanh Vong Hoai, et al.,

Appellant

Thanh Van Vo, et al.

Popular Name: [blank]

Number of Case/Order Below: 89-02397

Case Type: CV US.

JS-34 Yes

Judge Below: Oberdorfer 9053

Date of Judg./Order: 10-02-90 (EOD 10-4-90)

USDC Offense/Nature of Suit Code: 3440

Date Docketed: 11/19/90

Notice of Appeal Filed: 11-01-90

U.S. Mag:

FINANCIAL

USDC

COUNSEL: APPELLANT/PETITIONER	TYPE
John D. Hemenway 202/244-4819 4816 Rodman St., N.W. Washington, D.C. 20016	1453 EC
Laurence A. Elgin 703/425-7879 8929 Sleaford Place Annandale, VA 22003	

COUNSEL: APPELLEE/RESPONDENT	TYPE
Robert J. Pleshaw Law Office of Robert J. Pleshaw 1510 H St., NW #400 Washington, DC 20005 202/393-8100	EC
Sun Refining & Marketing Co., J. Gordon Forester, Jr., Geoffrey Wagner & Joseph Zulli J. Gordon Forester, Jr. 452-1400 Greenstein DeLorme & Luchs,P.C. 1620 L St. NW, Suite 900 Washington, DC 20036 Jones, Day, Reavis & Pogue; Millard F. Ottman, David C. Roseman Francis X. Markey 202-879-3939 Jones, Day, Reavis & Pogue 1450 G St., NW Washington DC 20005-2088 [by hand: Brian P. Maschler - Pro Hac Vice	3683 2311

ADDITIONAL COUNSEL FOR SUN REFINING
Stephen H. Abrams (202) 452-1400

same address ans [sic] J. Gordon Forester, Jr.

DATE	FILINGS-PROCEEDINGS
(J) 11-19-90	Copy of notice of appeal and docket entries from Clerk, USDC (n-4)
(J) 11-19-90	Order 86-6: Initial submission and procedural motions due 12-18-90; dispositive motions due on 1-02090. Docketing statement was mailed to counsel.
(J)11-19-90	Docketing fee paid in District Court on 11-1-90.
(V)11-30-90	2-Appellants' docketing statement - (m-21)[15]
(V)11-30-90	Letter from appellees' counsel objecting to appellant's docketing statement - (m-30)[15]
(V)11-28-90	2-Appellees' (Sun Refining & Marketing Co., J. Gordon Forester, Jr., Geoffrey

Wagner & Joseph Zulli) certificate as to parties, etc. - (m27)[15]

(V)12-13-90 1-Praecipe from attorney Stephen H. Abraham advising of change of address - (15)

(V)12-18-90 2-Appellants' initial submission - (m-18)[15] Def Apx N

(V)01-04-91 2-Appellants' supplement to the statement of the issues to be raised on appeal - (m-03)[15]

(S)01-10-91 Clerk's Order, sua sponte, that this case is scheduled for oral argument on 05/13/91 at 9:30 a.m. before Circuit Judges Edwards, Buckley and Randolph. The following schedule shall apply: Appellants' Brief & Appendix -02/13/91; Appellees' Brief

- 03/29/91; Appellants' Reply-05/13/91.

(S)01/10/91 Clerk's Order- sua sponte that this case is scheduled for oral argument on 05/13/91 at 9:30 a.m. before Circuit Judges Edwards, Buckley and Randolph. The following schedule shall apply: Appellants' Brief & Appendix -02/27/91; Appellees Brief-03/29/91; Appellants Reply-04/12/91.

(H)02/05/91 5-Appellant's revised and consolidated statement of the issues to be raised on appeal. (m-26).

(H)02/27/91 15-APPELLANT'S BRIEF (m-27)[BIN:]

(H)02/27/91 7-JOINT APPENDIX (VOL I).

(H)02/27/91 7-JOINT APPENDIX (VOL II.

(H)02/27/91 7-JOINT APPENDIX (VOL III).

(V)03-28-91 15-APPELLEES' (Sun Refining & Marketing Co., J. Gordon Forester, Jr., Jeffrey [sic] Wagner & Joseph Zulli) BRIEF - (m-28)

03-29-91 APPELLEES' (Jones Day Reavis & Pogue, Millard F. Ottman, Jr., & David C. Roseman) BRIEF - (m-29)

(V)04-01-91 7-JOINT APPENDIX - Volume IV: Statutes and Regulations (m-29)

(V)04-01-91 15-ERRATA TO APPELLANT'S BRIEF - (M-28)

(M)04-12-91 15-APPELLANTS' REPLY BRIEF (to Appellees Jones, Day, etc. brief)(m-12)[25]LODGED

(M)04-12-91 15-APPELLANTS' REPLY BRIEF (to Appellees' Sunoco, etc. brief)(M-12)[8] LODGED

(M)04-17-91 5-Appellants' motion to file extra reply brief of 20 pages to reply to second opposition by appellees (m-17)[8]

(M)04-17-91 5-Appellee's (Thanh Van Vo) notification that he will not file a brief or present oral argument [11]

(Z)04-24-91 Clerk's order that the following times are allotted for oral argument: Appellant - 15 minutes and Appellees - 15 minutes. Form 72 due May 1, 1991.

*(N)4-19-91 Per Curiam Order tha [sic] teh [sic] motion to file extra reply brief of 20 pages to reply to second opposition by appellees is denied. The Clerk is

directed to return the lodged brief.

(N)04/25/91 1-CERTIFICATE OF SERVICE (SUPPLEMENT)

(Z)4/29/91 Per Curiam order that appellants' motion in the nature of a Petition for Mandamus to the Clerk, or in the alternative, for reconsideration pursuant to Local Rule 7(g)(3) be denied.

(H)05/06/91 5-Appellee's motion for leave to present additional oral argument (m-06-[8].

(M)05-07-91 5-Appellants' opposition to appellees' motion for leave to present additional oral argument (m-7)[8]

(N)05-09-91 Per Curiam Order that appellees' motion for leave to

present additional oral argument and the opposition thereto, it is Ordered that the motion is granted and two counsel may present argument for the appellees'.

(M)05-13-91 5-Appellant's notice of new related case [No. 91-7070)(p-10)[8]

(M)05-13-91 5-Appellant's mtoion [sic] to supplement appendix (p-10) [8]

(M)05-13-91 15-SUPPLEMENTAL INDEX (VOL V) (p-10) [8] LODGED

(Z)05-13-91 ARGUED before Edwards, Buckley and Randolph, Cjs. On motion of J. Gordon Forester, Jr., Brian P. Maschler, a member of the Supreme Court of California, was allowed to argue pro hac

vice for appellees, Jones, Day, Reavis & Pogue, et al.

(M)05-15-91 5-Letter from counsel for appellant pursuant to FRAP 28(j) advising of additional authority (m-15) [25]

(Z)5-16-91 Per Curiam order that Appellants' motion to supplement appendix is denied and the Clerk is directed to return the lodged supplemental appendix. HTE, JLB, ARR

(M)05-17-91 5-Appellee's (Sun Refining) motion for leave to file a post argument brief on jurisdiction (m-17) [8]

(M)05-17-91 APPELLEE'S SUPPLEMENTAL BRIEF (m-17) [8] LODGED

(Z)5-28-91 Per Curiam order that the motion of Appellees for leave to file a post argu-

ment brief on jurisdiction be denied. The Clerk is directed to return the lodged brief to counsel.

(M)05-28-91 5-Appellants' response to motion for leave to file additional brief (m-28) [8]

(H)06=06-91 4-Transcript of Oral Argument [25]

(H)06-07-91 5-Appellant's emergency motion for expedition and stay (p-07) [8].

(cb)6-11-91 Per Curiam Order for the Court that the motion for expedition and stay is denied; Edwards, Buckley and Randolph, CJs.

(cb)6-11-91 Opinion for the Court filed by Circuit Judge Edwards.

(cb)6-11-91 Judgment for the Court that

	the judgment of the District Court appealed from in this caused [sic] is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.
(cb)6-11-91	Mandate Order
(M)06-17-91	5-Appellees' (Sun Refining et al.) bill of costs(m-17) [9]
(M)06-26-91	5-Appellees' (Jones, Day et al) bill of costs (m-25)[9]
(M)07-01-91	5-Appellants' opposition to appellees' (Sun Refining etc.) bill of costs (m-1) [9]
(D)07-11-91	20-Appellants' Petition for Rehearing En Banc (m-11)[1]
(D)08-06-91	Per Curiam Order: Appellants' suggestion for rehearing en banc has been

	circulated to the full court. No member of the court has requested the taking of a vote. The suggestion is denied. (Mikva, Wald, Edwards, R.B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson & Randolph, CJs)(by Clerk)
(H)08-13-91	5-Appellee's (Sun Refining) motion for attorney's fees (m-13) [1].
(H)08/13/91	5-Appellant's response to motion for attorney's fees (m-23) [1]
(H)09/26/91	Per Curiam Order that appellee's motion for attorney's fees is denied (Edwards, Buckley and Randolph, Circuit Judges).

91-1341

Supreme Court, U.S.
FILED
FEB 18 1992
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY
Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.
Respondents.

Appendix 4 to
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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8929 Sleaford Place
Annandale, Virginia
22003
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CONSTITUTION

AMENDMENT 1

Congress shall make no law ... abridging the freedom of speech, or of the press, or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

AMENDMENT 5

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 7

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 1981. Equal Rights Under the Law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982. Property Rights of Citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchsaee, lease,

sell, hold, and convey real and personal property.

42 U.S.C. § 1983. Civil action for deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

(2) Obstructing justice; intimidating party, witness or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so atended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being

or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enfore, the right of any person, or class of persons, to the equal protection of the laws.

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protec-tion of the laws, or of equal privileges and

immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, for giving his support of advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object

of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

DISTRICT OF COLUMBIA BAR CODE OF ETHICS ADOPTED BY THE DISTRICT OF COLUMBIA COURT OF APPEALS (in effect August, 1986)

* * *

DR 5-102

Withdrawal as Counsel When the Lawyer Becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a law-

yer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 5-101(B)

(1) if the testimony will relate solely to an uncontested matter

(2) if the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the

lawyer or his firm as counsel in the particular case.

SUPERIOR COURT OF D.C. - CIVIL RULES

RULE 12-I(b)

JUDGE IN CHAMBERS

The following matters may be presented for disposition to a Judge in Chambers designated by the Chief Judge, either ex parte or with opposing counsel, as appropriate; Appointment of a special process server; motions with respect to publication of notice requirements, judicial approval of settlements involving minors, approval of accounts, motions regarding security for costs, warrants and return of warrants, motions for temporary restraining orders writs of ne exeat, approval of subpoenas for administrative proceedings, orders involving execution upon attachment, and any other matters appropriate for such disposition.

SUPERIOR COURT OF S.C. - CIVIL RULES

RULE 65. INJUNCTIONS.

(a) PRELIMINARY INJUNCTION.

(1) NOTICE. No preliminary injunctiон shall be issued without notice to the adverse party.

(2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the com-mencement of the hearing of an applica-tion for a prelimiinary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidatin is not ordered, any evidence received, upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This

subdivision (a)(2) shall be so con-strued and applied as to save to the part-ies any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (a) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the Court finds that the applicant has made all reasonable efforts under teh circumstances to furnish to the adverse party's attorney, if known, otherwise to the adverse party, at the earliest practicable time prior to the hearing on the motion for such order (a) actual notice of the hearing and (b) copies of all pleadings and other papers filed to date in the

action or to be pre-sented to the Court at the hearing. Every temporary restraining order granted with-out notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the Clerk's Office and enter-ed of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the exten-sion shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a prelimin-ary injunction shall be set down for hear-ing at the earliest possible time and take precedence of all matters except

older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunctin and, if he does not do so, the Court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the Court may prscribe, the adverse party may appear and move its dissolution or modification and in that event the Court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by

any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of the District of Columbia, or of an officer or agency of either.

The provisions of rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those pesons in active concert or participation with them who receive actual

notice of the order by personal service or otherwise.

(e) EMPLOYER AND EMPLOYEE. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee.

Supreme Court, U.S.
FILED
MAR 23 1992
OFFICE OF THE CLERK

No. 91-1341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY,

Petitioners,

v.

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFERY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE'S BRIEF IN OPPOSITION

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Counsel for Petitioner

QUESTIONS PRESENTED

Whether a valid claim under 42 U.S.C. § 1983 may be stated against private attorneys who represented private litigants in the preliminary stages of a still-pending state court action, where (a) there is no allegation that the attorney defendants conspired with any public official to deprive plaintiffs of any federal right, (b) there is no allegation that the attorney defendants acted pursuant to any law, rule or custom that is unconstitutional, and (c) it *is* alleged that the attorney defendants' conduct violated state law.

Whether, in the absence of any allegation of a class-based, invidiously discriminatory animus, a valid claim may be stated under 42 U.S.C. § 1985(3).

Whether leave to amend a concededly defective complaint was properly denied where (a) no request for leave to amend was made until months after the case was dismissed and an appeal of the dismissal had been filed, (b) the complaint's deficiencies are not attributable to new facts or a change in the law, and (c) such deficiencies cannot be cured by amendment.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-1341

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

v.

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS JONES, DAY, REAVIS & POGUE, MILLARD F. OTTMAN AND DAVID C. ROSEMAN

STATEMENT OF THE CASE

At issue in this case is whether petitioners' complaint states a valid cause of action under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3). Petitioners claim a deprivation of

civil rights based upon respondents' alleged abuse of District of Columbia procedure during the initial phase of prior litigation between Thanh Van Vo ("Vo"), and Thanh Vong Hoai ("Hoai") and Sun Refining & Marketing Co., Inc. ("Sunoco").[1]

The District Court dismissed petitioners' case for failure to state a claim upon which relief can be granted. *Hoai v. Vo,* Civ. Action No. 89-2397 (D.D.C. Oct. 2, 1990), *reprinted in* Petitioners' Appendix ("A-") at 27. The section 1983 claim was dismissed on the ground that the Complaint fails to allege facts which could support a finding that respondents, all private parties, acted "under color of" law in committing the challenged conduct. The section 1985(3) claim was dismissed on the ground that the complaint does not allege the existence of a

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[1]That litigation, *Vo v. Hoai*, Civ. Action No. 7075-86 (D.C. Sup. Ct.) (the "state court action"), which concerns Hoai's right to operate a gas station franchise, is still pending. However, as discussed below, the events in the state court action complained of here -- specifically, the entry of a ten-day temporary restraining order directing petitioners to return possession of the gas station to Vo and a consent order under which Sunoco agreed to continue to supply gas to the station while its ownership was in dispute -- had long since expired when the present action was filed. The District of Columbia procedure that respondents allegedly abused in the state court action was repealed years before this action was filed. In addition, Vo's franchise, contested by Hoai in the state court action, already had expired when this suit was brought. Moreover, in a separate action, (*Hoai v. Sun Refining & Marketing Co.*, Civ. Action No. 87-2456 (D.D.C.)), which was filed before this one, Hoai has obtained a judgment and a damage award against Sunoco for wrongfully terminating, by means of the same consent order, the franchise. Thus, the abuses alleged here (a) could have been cured in the same proceeding in which they were committed, (b) are largely moot, and (c) already have been redressed in a separate action.

conspiracy motivated by a class-based, invidiously discriminatory animus. Petitioners appealed the dismissal and the Court of Appeals affirmed, upholding in all respects the reasoning of the District Court. *Hoai v. Vo*, 935 F.2d 308 (D.C. Cir. 1991), A-1.

The standards governing when the conduct of private parties may be actionable under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3) are well established by the decisions of this Court, and have been followed by all of the Circuits. The pleading requirements applicable to claims brought under these statutes, which requirements reflect these recognized limitations on availability of relief, are similarly well-settled. The instant ruling by the Court of Appeals is entirely consistent with this long-standing precedent. Petitioners' eleven "questions presented," which distort the Court of Appeals' ruling and the bases therefor, state no legitimate reason for reversing that ruling. Therefore, the petition for writ of certiorari should be denied.

A. Background Facts

1. The State Court Action and the Temporary Restraining Order

On August 28, 1986, Vo, then represented by respondents Jones, Day Reavis & Pogue, Milland F. Ottman, and David C. Roseman (collectively, the "Jones, Day Defendants"), filed the state court action.[2] Vo

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[2]The Jones, Day defendants served as Vo's counsel at the very beginning of the state court action; respondent Robert Pleshaw substituted in as Vo's counsel in early 1988.

alleged in that action, *inter alia*, that Hoai and the Hemenways had wrongfully and forceably evicted Vo from his Sunoco service station.[3] Vo concurrently filed and served upon all defendants a motion for a temporary restraining order ("TRO"). On August 29, 1986, after a two-day evidentiary hearing at which Hoai and the Hemenways testified, the Superior Court granted Vo's motion for a TRO. *See Vo v. Hoai*, Civ. Action No. 7075-86 (D.C. Sup. Ct. Aug. 29, 1986), A-461; Complaint, ¶ 33, A-388. The order required, *inter alia*, that Hoai and the Hemenways return possession and occupancy of the station to Vo, and that Sunoco continue to supply Vo with petroleum products and permit him to operate the service station under the terms of the existing franchise agreement between Vo and Sunoco. *Id.*

Vo did not seek further injunctive relief against Hoai or the Hemenways, and the TRO expired with respect to them on September 8, 1986. In order to maintain the operation of the service station, Vo entered into a "merely private agreement" with Sunoco, Complaint, ¶ 43, A-395, which temporarily extended the TRO only as to Sunoco. A-461. The stipulated extension of the TRO with respect to Vo and Sunoco (the "consent order") was signed by the Superior Court on September 8, 1989. It expired, as did the franchise agreement contested by Vo and Hoai, on March 31, 1987.[4]

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[3]*See* Amended Verified Complaint filed in state court action, *reprinted in* Joint Appendix ("J.A") at 138-57.

[4]The consent order was made expressly subject to the Superior Court's final ruling on the merits of the dispute between Vo and Hoai.

Hoai and the Hemenways, who were not parties of the consent order, nonetheless sought an interlocutory appeal of the order, challenging its validity. J.A. 91-137. The Court of Appeals for the District of Columbia dismissed the appeal by the Hemenways as frivolous. *Hoai v. Vo*, No. 86-1323 (D.C. Sup. Ct. Feb. 25, 1988), J.A. 161. While Vo's appeal was still pending, the consent order expired by its own terms, and the District of Columbia Court of Appeals denied Hoai's appeal as moot. *See Hoai v. Vo.*, No. 86-1323 (D.C. Sup. Ct. Mar. 4, 1988), J.A. 162-63.[5]

As noted, the state court action is still pending. No final ruling on the merits has ever been issued in that case. The case has been placed on the suspense calendar at the request of Hoai and the Hemenways.

2. Other Actions

a. The RICO Action

On or about March 23, 1987, Hoai filed a complaint against Vo and others in the United States District Court for the Eastern District of Virginia. That complaint alleged twenty-four counts, including, *inter alia*, ten counts brought under RICO, and one count under 42 U.S.C.

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[5]In August, 1988, petitioners filed a third-party complaint against respondents, among others, alleging, as they do in the present action, that these defendants made misrepresentations to the Superior Court, and had extended the TRO without notice to Hoai. J.A. 176-239. The third-party complaint further alleges that in committing these actions, these defendants had acted "*ultra vires* in violation of" (sic) the rules of the Superior Court. J.A. 216. Petitioners later voluntarily dismissed the Jones, Day defendants from the third party complaint.

§§ 1983, 1985, 1986 and 1988. J.A. 247-379. Many of the allegations of this complaint focused on the same ultimate issue -- Hoai's right to the possession of the Sunoco service action -- that is the subject of the state court action.

On July 2, 1987, the District Court for the Eastern District of Virginia entered an order dismissing the complaint. *See Hoai v. Vo*, Civ. Action No. 87-0294 (E.D. Va. July 2, 1987), J.A. 380.[6]

b. The Petroleum Marketing Practices Act ("PMPA") Action

On or about September 5, 1987, Hoai filed in the United States District Court for the District of Columbia an action under the PMPA, 15 U.S.C. § 2801, *et seq.* against Sunoco. That action, like the present one,

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[6]Despite this dismissal and the fact that the substance of petitioners' RICO complaint was never at issue in the present case, petitioners' recitation of the "background facts" of this case draws heavily from their RICO complaint. *See* Petitioners' Brief ("Br.') at 3, n.1. The allegations of that complaint have no relevance here. The Jones, Day defendants attached to their original motion to dismiss the RICO complaint and certain other public records only to apprise the District Court of petitioners' previous collateral attacks upon the interim rulings and agreements entered in the state court action. Contrary to petitioners' contentions, Br. at 56-57, judicial notice of matters of public record does not convert a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure to a motion under Rule 56. *See, e.g., Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986); 5A C. Wright and A. Miller, *Federal Practice and Procedure*, § 1364, at 475-79 (2d ed. 1990). In any event, the courts below did not look beyond the four corners of the Complaint in assessing its legal sufficiency.

challenged the validity of the TRO and the consent order. The Jones, Day defendants are not parties to that action.

The District Court, in view of the pendency of the prior-filed state court action, initially stayed the PMPA action. Hoai appealed, and the Court of Appeals for the District of Columbia Circuit overturned the stay, noting that the PMPA action would "not unduly interfere with" the state court action because:

> First, Hoai has not sought to attack any judgment of the Superior Court. The Superior Court simply ratified a voluntary agreement between Vo and Sunoco. The consent order did not represent an exercise of the Superior Court's independent judgment and Hoai has not attacked that judgment. Rather, Hoai's sole complaint involves Sunoco's agreement to continue supplying gasoline to Vo rather than to Hoai, not the Superior Court's resolution of the dispute between Vo and Sunoco or between either of those parties and Hoai.
>
> . . . The consent order on its face involved only Vo and Sunoco and did not purport to decide any of the issues involving Hoai. Rather, the Superior Court specifically stated that "[t]his Consent Order shall not be construed to extend the said Restraining Order as to any other defendant."[7]

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[7]*Hoai v. Sun Refining & Marketing Co.*, 866 F.2d 1515, 1519 (D.C. Cir. 1989). Given these findings by the D.C. Circuit in the PMPA case, petitioners were estopped in the present case from characterizing the subject consent order as anything other than "a voluntary agreement between Vo and Sunoco" which "did not represent an exercise of the

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Hoai moved for summary judgment in the PMPA case. By order dated October 2, the District Court granted Hoai's motion with respect to liability. *See Hoai v. Sun Refining & Marketing Co.*, Civ. Action No. 87-2456 (D.D.C. Oct. 1, 1990). A trial on damages was subsequently held, and the jury awarded Hoai $65,000 in compensatory damages.

B. The Proceedings Below

In this case, which is the third independent action in which petitioners have attacked the conduct of the litigants in the state court action, petitioners have added to the roster of defendants the attorneys who represented those litigants. The conduct with which these attorney defendants are charged is completely circumscribed within their representation of the parties to the state court action. The attorney defendants were not, and never have been, parties in interest in that underlying action.

Respondents moved to dismiss the case, and while their motions to dismiss were still pending, petitioners filed two separate motions to stay this case, first for a stay pending the outcome of the PMPA case, which had been

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[7](...continued from previous page)
Superior Court's independent judgment." As shown below, this necessary separation between the actions of the litigants and their counsel, on one hand, and the District of Columbia judiciary, on the other, alleged clearly in the Complaint, precludes attributing respondents' conduct to the District of Columbia, and thus, precludes petitioners from satisfying the "under color of law" requirement of section 1983.

pending for approximately two years when this action was filed, and then for an "indefinite" stay. A-135, 181.

On October 2, 1990, the District Court dismissed the action. See *Hoai v. Vo*, Civ. Action No. 89-2397, Oct. 2, 1990 Mem. Op., A-32.[8] No leave to amend was provided in the District Court's Order; petitioners had not requested such relief. The District Court also directed plaintiffs to show cause why sanctions should not be imposed. *Id.*

On or about November 1, 1990, petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to reconsider the District Court's order dismissing the case. On that same date, petitioners filed a Notice of Appeal of the same order. On or about January 4, 1991, petitioners filed a post-dismissal motion for leave to amend the Complaint.

Petitioner's appeal was argued on May 13, 1991. At that time, petitioner's Rule 60(b) motion had not been decided. In affirming the District Court's order of dismissal, the Court of Appeals ruled, as a threshold matter, that the pendency of the Rule 60(b) motion did not bar appellate review of the order -- *i.e.*, that Fed. R. App. P. 4(a)(4) was inapplicable. *Hoai v. Vo*, 935 F.2d at 311-12, A-10-11. The Court of Appeals also rejected petitioners' request, raised at oral argument, for leave to amend the concededly defective Complaint.

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[8]While the District Court did not issue a formal ruling on petitioners' stay motions, it implicitly denied them (or at the least, rendered them moot) by dismissing the action.

Petitioners moved for rehearing *en banc*. On August 6, 1991, the Court of Appeals denied, *en banc*, petitioners' suggestion that the matter be reheard *en banc*. *See Hoai v. Vo*, Civ. Action No. 90-7170 (D.C. Cir. Aug. 6, 1991). By Order dated November 19, 1991, the Court of Appeals denied the petition for rehearing. *See Hoai v. Vo*, Civ. Action No. 90-7170 (D.C. Cir. Nov. 19, 1991) (per curiam).

SUMMARY OF ARGUMENT

I. Dismissal of Count I of the Complaint, which is brought under 42 U.S.C. § 1983, was appropriate because the Complaint fails to allege facts sufficient to support a claim that the Jones, Day defendants, private attorneys representing a private litigant, acted "under color of law," or that the Jones, Day defendants deprived petitioners of any cognizable right under the Constitution or federal statute. Under the plain language of the statute and the ample precedent of this Court, both requirements must be met before a valid claim under section 1983 may be asserted.

II. Petitioners' claim under 42 U.S.C. § 1985(3) (Count II of the Complaint) was properly dismissed because the Complaint does not set forth any facts to support a claim that the Jones, Day defendants acted with a class-based, discriminatory animus. Both Vo, the Jones, Day defendants' client in the state court action, and Hoai are Vietnamese. The only discrimination alleged in the Complaint is directed to a class of franchise holders, which does not fall within the purview of section 1985(3).

III. The Court of Appeals' denial of petitioners' post-appeal request for leave to amend is firmly supported by

the applicable law. Petitioners' request for leave to amend is procedurally defective, and the substantive defects of the Complaint could not, in any event, be cured by amendment.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A VALID CAUSE OF ACTION UNDER 42 U.S.C. § 1983

There are two fundamental and uncompromising requirements that a plaintiff must meet in order to state a claim under section 1983. *First*, he must allege that the defendant has deprived him of a right that is secured by the Constitution and laws of the United States. *See Hagans v. Lavine*, 415 U.S. 528, 536 (1974); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). *Second*, he must allege that the defendant deprived him of such a right while acting under color of the law of a state, a territory or the District of Columbia. *See NCAA v. Tarkanian*, 488 U.S. 179, 190 (1988); *Gomez v. Toldeo*, 446 U.S. 635, 640 (1980); *Adickes*, 398 U.S. at 150.[9] The Complaint does not satisfy either of these criteria, and therefore fails to state a claim cognizable under section 1983.

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[9]In addition to the substantive restrictions upon the scope of relief under Title 42, "every . . . circuit has articulated a requirement of particularity in pleading for civil rights complaints." *Hobson v. Wilson*, 737 F.2d 1, 30 & n.87 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *see also Martin v. Malhoyt*, 830 F.2d 237, 258 (D.C. Cir.), *reh'g denied*, 833 F.2d 1049 (1987).

A. The Complaint does not state a valid claim that the Jones, Day defendants acted under color of state law.

Private parties, for purposes of section 1983, may act "under color of" state law in two ways: by conspiracy with public officials, and by wilfully engaging in joint activity with a state or its agents. *See Adickes*, 398 U.S. at 152 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)); *see also Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 n. 21 (1982). The first possibility does not apply here, since, as noted by the courts below, the Complaint explicitly avoids alleging that respondents conspired with District of Columbia officials. *See* Complaint, ¶¶ 41, 42, A-394.

The second possible basis for section 1983 relief against private parties also is unavailing. *First*, there is absolutely no basis alleged in the Complaint for imputing to the District of Columbia either the creation or the "holding out" of the subject consent order, an "independent," "voluntary" and "merely private" agreement, Complaint ¶¶ 38, 43, 45, A-392, 395, 398, respectively. Petitioners are careful to allege, in keeping with the D.C. Circuit's ruling in the PMPA case, that the Superior Court's signature of this agreement did not transform it into an official act of the State.[10] The gravamen of petitioners' claims appears to be that respondents allegedly "held out" this private agreement to

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[10]*See* Complaint, ¶ 43, A-395 (respondents "used the device of getting an unwitting judge of the Superior Court (not the TRO judge) to sign and ratify their independent agreement without any independent judgment by that judge"); ¶ 41, A-394 ("The signing of this 'consent order' merely ratified their independent agreement without any independent judgment of the Superior Court.").

have been sanctioned by the Superior Court, where in fact, it was not. *See id.*, ¶¶ 43, 44, A-395-96.

The emphasis placed by petitioners upon the private nature of the agreement, their obvious attempts to divorce the creation and use of that agreement from any acts of the Superior Court, and the claims that respondents misrepresented the private nature of the agreement to others, are inimical to any notion that respondents' conduct is attributable to the State. By petitioners' own averments, the District of Columbia had no involvement in the private conduct complained of, much less the significant state participation required to meet the "joint activity" requirement. *See Lugar*, 457 U.S. at 927; *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). *Cf. Flagg Bros, Inc. v. Brooks*, 436 U.S. 149, 157 (1978) (lack of overt, official involvement in property deprivation precludes finding of state action).

Second, the Complaint fails to identify a District of Columbia law, rule or custom that might have facilitated the private wrong alleged. The "judge-in-chambers" rule obliquely referred to in the Complaint, which petitioners in subsequent briefing have identified as the now-repealed District of Columbia Superior Court Rule 12-I, cannot fairly be said to authorize, support or encourage the conduct challenged in the Complaint.[11]

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[11]Former Rule 12-I provided as follows:

> The following matters may at anytime be presented for disposition to a judge in chambers designated by the Chief Judge, either *ex parte* or with opposing counsel, as appropriate: Appointment of a special process server; motions with respect to publication of notice

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That it does not expressly prohibit such conduct is not enough to meet the under color of law requirement.

If the lack of any nexus between the Jones, Day defendants' conduct in serving as counsel to Vo in the state court action, on one hand, and any law or involvement of the State, on the other, were not enough to mandate the dismissal of Count I, the Complaint's allegations that their conduct *violated* state law, clearly are. Such allegations abound in the Complaint.[12]

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[11](...continued from previous page)
requirements, judicial approval of settlements involving minors, approval of accounts, motions regarding security for costs, warrants and return of warrants, motions for temporary restraining orders, writs of *ne exeat*, approval of subpoenas for administrative proceedings, orders involving execution upon attachments, and any others matters appropriate for such disposition.

[12]For example, paragraph 34 of the Complaint alleges that "*by false charges and in violation of applicable law*" (emphasis added), defendants deprived Hoai of his right to counsel of his choosing and Hemenway of his right to clients of his own choosing. A-392. In the first of the paragraphs numbered as 43, petitioners allege that "the lawyer defendants held out falsely that a TRO could be extended without notifying the major party in interest," A-394-95, implying that the "truth" is that District of Columbia law dictates that notice be given in that circumstance.

The second paragraphs 43 and 44 of the Complaint allege even more pointedly that respondents violated "the law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia." Paragraph 43 alleges that such laws and custom *require* that in any proceeding parties must be given adequate notice of actions which "principally" affect them; paragraph 44 alleges that respondents "planned and schemed to evade" those very requirements. A-397. If, as petitioners allege, notice were required

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Lugar holds that an allegation that a defendant acted contrary to state law precludes a claim that the defendant acted "under color of" state law:

> Count two alleged that the deprivation of property resulted from respondents' "malicious, wanton, willful, oppressive [sic], [and] unlawful acts." By "unlawful" petitioner apparently meant "unlawful under state law." To say this, however, is to say that the conduct of which petitioner complained could not be ascribed to any governmental decision; rather, respondents were acting contrary to the relevant policy articulated by the State. Nor did they have the authority of state officials to put the weight of the State behind their private decision, *i.e.*, this case does not fall within the abuse of authority doctrine recognized in *Monroe v. Pape*, 365 U.S. 167 (1961). That respondents invoked the statute without grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under § 1983 but challenges only private action.[13]

In the present case, the allegations of Count I that respondents violated state law are far more explicit than those of *Lugar's* count two. Since "private misuse of a state statute does not describe conduct that can be

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before a temporary restraining order could be extended, then such a matter would not be "appropriate for disposition" in chambers under the former Rule 12-I. Thus, petitioners again allege that respondents have violated that provision.

[13]457 U.S. at 940.

attributed to the State," 457 U.S. at 941, Count I was properly disallowed.

Despite the clear teachings of *Lugar*, petitioners persist in their contention that the same conduct alleged to violate District of Columbia law, can at the same time be committed "under color of" District of Columbia law.[14] Not only is this contention expressly refuted by *Lugar*, it is utterly counterintuitive.

Petitioners' reliance upon *Lugar* is misplaced for several other reasons. Petitioners apparently seek to equate their section 1983 claim with *Lugar's* count one, which challenged the constitutionality of Virginia's pre-judgment attachment statute.[15] Petitioners' attempted analogy fails. *First*, the Complaint does not challenge the constitutionality of any District of Columbia law, rule or custom. To the contrary, the Complaint explicitly alleges that District of Columbia law and the Constitutional requirements of due process are co-extensive.[16]

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[14]Br. at 32-33, 35, 37.

[15]Br. at 30-32.

[16]*See* Complaint, ¶ 43(II), A-397: "The law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia *as well as* the Due Process clause of the United States Constitution and the right to petition for the redress of grievances enshrined therein require that at any proceeding, no action be taken which principally affects a party to that proceeding without adequate notice to that party and a chance being granted for that party to respond and participate in that process which affects his interests." (emphasis added).

Second, there is no similarity between the District of Columbia's former judge-in-chambers procedure and the pre-judgment attachment procedure challenged in *Lugar*.[17] The District of Columbia Superior Court has its own, well-defined procedures for prejudgment attachment.[18] Vo did not make use of this procedure. No writ of attachment was issued by the Superior Court, in chambers or otherwise. Indeed, any such involvement by that court would be at clear odds with petitioners' allegations that the Superior Court did not place its imprimatur upon the consensual extension of the temporary restraining order. Factually and legally, *Lugar* lends no credence to petitioners' section 1983 claim.

The fact that, with respect to the Jones, Day defendants, the Complaint merely describes the actions of attorneys *qua* attorneys, further undermines the viability of petitioners' section 1983 claim. This Court, as well as the lower courts, uniformly have recognized that privately retained attorneys performing "traditional lawyer functions" on behalf of their clients in private litigation do not act under color of law for purposes of section 1983. *See Polk County v. Dodson*, 454 U.S. 312, 318 (1981).[19]

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[17]*See Lugar*, 457 at 939 n. 21 ("The holding today . . . is limited to the particular context of prejudgment attachment.")

[18]*See* District of Columbia Superior Court Rule 64-I.

[19]*See also McCord v. Bailey*, 636 F.2d 606, 613 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 983 (1981) ("[l]awyers may be officers of the court, but they are not officers of the state within the meaning of [section 1983]' . . . . In their capacities as representatives of a client in court, private counsel do not act under color of state law") (citations

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Were it otherwise, attorneys representing parties in cases where race *is* an issue (which is clearly *not* the case here), would risk Title 42 liability merely by advocating, on behalf of their clients, positions adverse to alleged victims of racism. The ill-defined theory of liability advanced by petitioners, if allowed, would chill vigorous advocacy in cases involving minorities.

B. The Complaint does not state a valid claim that the Jones, Day defendants deprived petitioners of a federal right

Petitioners have failed to meet the second basic pleading requirement applicable to claims under section 1983 -- namely, alleging the deprivation of a federal right. The greivances that petitioners *do* allege concern

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[19](...continued from previous page)
omitted); *Black v. Bayer*, 672 F.2d 309, 314 (3d Cir. 1982) (citing "long line of decisions . . . recognizing that private attorneys do not act under color of state law for purposes of § 1983); *Brown v. Chaffee*, 612 F.2d 497, 501 (10th Cir. 1979) ("[l]awyers do not act under color of state law solely by engaging in private litigation on behalf of their clients"); *Jones v. Jones*, 410 F.2d 365, 366 (7th Cir. 1969), *overruled on other grounds by Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978) ("[l]awyers who are not also parties in interest and are engaged in private litigation on behalf of clients do not act under color of state law within the meaning of 42 U.S.C. § 1983."); *Skolnick v. Martin*, 317 F.2d 855, 857 (7th Cir.), *cert. denied*, 375 U.S. 908 (1963); *Page v. Sharp*, 487 F.2d 567, 570 (1st Cir. 1973) ("even under state court appointments, the courts have uniformly held that an attorney, whether appointed or retained, is not acting under color of law."); *Holsey v. Chandler*, 598 F. Supp. 368, 370 (D.D.C. 1984) (no valid claim under § 1983 even though court-appointed counsel was charged with denying the due process rights of his own client).

(1) John Hemenway's right to represent Hoai; (2) David Hemenway's right to work at the service station; (3) Hoai's right to counsel of his choosing; (4) petitioners' right to travel in the vicinity of the service station; (5) Hoai's right to occupy the service station and (6) plaintiffs' due process right to notice of the consent order between Hoai and Sun Refining. On the facts as pled, these so-called "rights" do not exist under the Constitution or federal statute.

There is no federally-sanctioned "right" to represent another in a judicial proceeding, to work at a service station, or to retain a particular attorney in a civil matter.[20] Petitioners' claim to a right of freedom to travel within the vicinity of the service station likewise has no basis in federal law. The only federally recognized "right to travel" derives from Clause 1 of Section 2 of Article 4 of the Constitution, which has been construed to provide that a United States citizen has the right to travel from one state to another and to take up residence in the state of his choice. *See Jones v. Helms*, 452 U.S. 412, 418 (1981). Petitioners' claimed right to "travel within the vicinity of the service station" certainly does not come within that protection.

Hoai's alleged right to occupy the service station is the ultimate issue in dispute in the state court action. The merits of that case still have not been decided. The same

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[20]John Hemenway was disqualified as counsel for Hoai in the state court action because he was named as a defendant in that action.

issue also is in dispute in the PMPA case, and has been decided in Hoai's favor.[21]

Petitioners' allegations that the subject consent order deprived them of due process are belied by the allegations of the Complaint and the public record. As admitted in the Complaint (and determined by the District of Columbia Circuit before this action was filed), none of petitioners was bound by the consent order; rather, it explicitly excluded them from its reach. Complaint, ¶ 39, A-393. Accordingly, neither the existence of the consent order, nor the fact that petitioners were not given advance notice of it, impaired any legal right of petitioners. For example, it did not, and does not, prevent petitioners from exercising any right they may have to pursue their claims and defenses in the state court action. As noted, petitioners appealed the consent order and lost. They were free to pursue in the state court action other forms of relief from the consent order, including, for example, a summary disposition of the merits, but chose not to. Process was not denied petitioners in the state court action; they

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[21]The Complaint does not allege that the Jones, Day defendants violated the PMPA, but states expressly to the contrary: "Hoai does not sue under that federal act, but has done so separately." Complaint ¶ 20, A-381. Such a claim is not available against the Jones, Day defendants since the PMPA applies only to franchisors and franchisees. *See Basales v. Texaco, Inc.*, 516 F. Supp. 655, 662 (D.N.J. 1981) (the PMPA's "coverage does not extend to third parties"); *see also Sanna v. Friendly Service Stations, Inc.*, 593 F. Supp. 493 (D. Conn. 1983). Accordingly, as to the Jones, Day defendants, there was no basis to grant petitioners' motions to stay this case pending the outcome of the PMPA case. *Cf.* Br. at 52-53. The judgment subsequently entered in the PMPA case had no bearing upon the viability of petitioners' claims against the Jones, Day defendants.

simply elected to forego the process that was available. Instead, they have chosen to proliferate, in separate actions, collateral attacks upon the litigants' conduct in the state court action.

Petitioners' due process claim is also untenable because they cannot meet the "state action" requirement which attends the pleading and proof of such a claim. This Court has held that where the right alleged to have been deprived arises under the Bill of Rights of the Constitution, the claimaint "must establish not only that [the § 1983 defendant] acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . ." *Flagg Bros. v. Brooks*, 436 U.S. at 156. *See also Lugar*, 457 U.S. at 936-937 n. 18.

Petitioners have not pled facts that support a finding that the conduct of respondents is "properly attributable" to the District of Columbia. The same factors which preclude a finding that respondents acted "under color of" state law bar any claim that they are "state actors." The state action requirement is not met by "private use of state-sanctioned private remedies or procedures," *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 485 (1988), or by the state's acquiesence in defendant's conduct. *Flagg Bros.* 436 U.S. at 165. *See also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974) ("exercise [by a regulated entity] of the choice allowed by state law where the initiative comes from it and not from the State does not make its action in doing so 'state action'"). State action will not be found absent the "overt, significant assistance of state officials." *Cf. Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2084 (1991)

(citation omitted).[22] Here, petitioners explicitly disavow any significant assistance by the District of Columbia judiciary, and allege that respondents violated state law rather than acted in conformity with it. The absence of state action forecloses any section 1983 claim based upon an alleged violation of petitioners' due process rights.

II. THE COMPLAINT FAILS TO STATE A VALID CLAIM UNDER 42 U.S.C. § 1985(3)

Count II of the Complaint is styled as a section 1985 claim, although it does not specify what subpart of that section petitioners intended to invoke. Because petitioners' conclusory allegations most closely track the statutory language of subpart (3) of this section, respondents briefed, and the courts below ruled upon, that section.[23]

The Complaint alleges that respondents conspired to deprive Mr. Hoai of his property rights "by the use of the consent order and allegedly false testimony" in violation of 42 U.S.C. § 1985(3). Complaint, ¶ 48, A-401. But as noted by the courts below, section 1985(3) does not apply to all conspiratorial interferences with the rights of others; rather, "there must be some facial, or perhaps otherwise class-based, invidiously discriminatory animus

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[22]*See also Lugar*, 457 U.S. at 937 ("[w]ithout a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them").

[23]Petitioners do not address the adequacy of their section 1985(3) claim in their brief.

behind the conspirator's action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

The Complaint alleges that respondents' actions constituted an "invidious discrimination by which a rightful franchise holder is discriminated against in favor of an intruder. . . ." Complaint at ¶ 48, A-401. It does not allege that such actions were motivated by a racial or any other class-based animus. Under *Griffin* this omission is fatal to Count II. *See also United Bhd. of Carpenters v. Scott*, 546 U.S. 825, 836-39 (1983) (the Court declining to interpret section 1985(3) to encompass conspiracies motivated by commercial or economic animus).

III. PETITIONERS ARE NOT ENTITLED TO AMEND THE COMPLAINT

As noted above, petitioners first sought leave from the District Court to amend the Complaint approximately three months after it was dismissed and two months after petitioners perfected their appeal of that dismissal. Thus, their Notice of Appeal did not encompass their late-filed motion to amend.

During oral argument of their appeal, petitioners admitted that their complaint was "unartfully" (sic) pleaded, "weak," "not a good complaint," and "sloppy." A-59, 60, 63. They also admitted that their section 1985(3) claim "improperly left out a crucial allegation," namely, that the deprivation of rights they allegedly suffered "was because of racial prejudice." A-64.

As recognized by the Court of Appeals, the inadequacy of the Complaint is not the result of a "single misstep," *cf.*

Conley v. Gibson, 355 U.S. 41, 48 (1957), but of the absence of facts necessary to state a claim against respondents under Title 42. With respect to petitioners' section 1985(3) claim, an amendment could not change the fact that the Jones, Day defendants were representing one Vietnamese individual against another -- a fact which on its face precludes a claim of racial discrimination. Regarding petitioners' section 1983 claim, petitioners' brief offers no insight as to how an amendment might cure the fundamental shortcomings of the pleading. The proposed amended complaint submitted by petitioners with their motion for leave to amend alleges even more definitively than the original complaint that respondents *violated* District of Columbia laws, which, under *Lugar*, is fatal to such a claim. *See* Proposed Amended Complaint, ¶¶ 27, 33, 47, 48. Petitioners' theory continues to be that allegations that certain conduct abrogated state law may co-exist, in a valid section 1983 complaint, with allegations that such conduct was carried out under color of state law. Petitioners are wrong.

A party is not entitled to amend his complaint where such an amendment would be futile. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). Petitioners have demonstrated the futility of attempting to amend this pleading.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY

Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.

Respondents.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE

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No. 91-1341

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, and DAVID HEMENWAY,

Petitioners,

v.

THANH VAN VO, MILLARD F. OTTMAN, JR., DAVID C. ROSEMAN, JONES, DAY, REAVIS and POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING AND MARKETING COMPANY, INC.,

Respondents.

Petition For The Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE VIETNAMESE COMMUNITY OF WASHINGTON, D.C., MARYLAND AND VIRGINIA, IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.1, .2 and .4 of the Rules of this Court, the Vietnamese Community of Washington, D.C., Maryland and

Virginia respectfully moves for leave to file the annexed brief amicus curiae in support of appellants. Respondents have refused consent for the filing of this brief.

INTEREST OF THE AMICUS CURIAE

The Vietnamese Community of Washington, D.C., Maryland and Virginia is the major Vietnamese-American organization for the Washington, D.C. Metropolitan area and the surrounding states. It is a non-profit organization dedicated to the preservation and promotion of the welfare of Vietnamese citizens and residents of this great Country. Its members by and large know first hand what it is to have to deal with and live under totalitarian domination and the importance of constitutional safeguards and the Rule of Law in preserving individual liberties in the face of officials determined to ignore such rights and impose the rule of fiat. Its membership ex-

ceeds forty thousand Vietnamese and, through a working alliance with similar organizations in all the other States of the Union it is representative of over one-million Americans of Vietnamese origin or ancestry.

Heretofore, the Vietnamese-Americans, and Pacific and Asian-Americans generally, have not been active in filing Amicus Curiae briefs before the Court or in making known their concern about the rising tide of incidents in which discrimination against Asian-Americans, often in connection with their operation of small businesses, is coming to the attention of the larger American public. No doubt that is part of the reason why the actions leading to this present petition occurred. The Vietnamese Community hopes that beginning now, with this case, this indifference to the civil rights of the Asian-Americans in this country, Americans

who are justly famed for their achievements in academia, in business and in many other fields, ends. The Community looks forward to filing many more briefs in support of such righteous causes as this until unfortunate incidents such as those that occurred here are exposed to the great good will of the American people and ended by observance of the rights of Asian-Americans along with all other Americans in the courts, not only of the Nation's Capital, but all over this land.

The Community is concerned with the instant petition because, unless it is heard and the decisions below overruled there will be a clear signal that in the national capital, of all places, the civil rights of Asian-Americans specifically granted as a shield against the misuse of the power of the states for the purpose of depriving individuals of their rights under the Federal Constitution and laws will

be abridged and ignored with impunity in the very courts themselves, courts that are held out to all who come here as the safeguards of our liberties and our sacred right to own a piece of the American dream through hard work and sacrifice.

The dream of Dr. Martin Luther King was that of an America where all Americans, regardless of their skin color or heritage, could walk, work and prosper side by side. His weapons were the non-violent protest and the use of the courts to enforce the civil rights laws that give freedom and dignity to all Americans. Sadly, for the Asian-American community, and for the Vietnamese-American community in particular, the course of this case of Thanh Vong Hoai is a corruption of that dream, a betrayal of its vision, a disappointment to those who look to the courts with hope that the laws will indeed be elevated above status, above estab-

lished position and above the mundane politics of Washington, D.C. What happened in this case is an elevation of the rationalization of "managing" those who are not perceived as important because of their political and ethnic affiliation out of sight and out of mind,[1] of treating them as invisible so that their rights may be ignored without discomfort to a system that fools itself that it is observing those rights.

What is evident throughout this case is that if Mr. Hoai had been allowed to have his case heard and have the constitutionality of Superior Court Rule 12-I (b) as it stood in September of 1986 examined in conjunction with the misuse it

[1]Cf. Ellison, Ralph, The Invisible Man. It is indeed ironic that Asian Americans should find so much to build upon in the struggles of the African-Americans for their civil rights, so many shoulders to stand upon now that their plight in the political arena echoes that of the African-Americans of several generations ago.

enabled of the consent judgment procedures of that court, that rule, (since repealed in pertinent part) and the procedures associated with it would not withstand the scrutiny. The same can be said of the absolutely uncontrolled use of the canons of ethics as adopted by the District of Columbia Court of Appeals and in effect at that time to disqualify one's opponent's counsel on a purely tactical and harassing basis. The same can be said for "bonding" procedures scarcely worthy of the name, where the "protection" for the prejudgment seizure and destruction of one's business property was for all practical purposes non-existent -- what with the allowance of "payment" of the bond by uncertified, unverified check (in this case drawn on the business that was seized illegally itself) with no precaution against insufficiency of funds backing the check and with nothing to stop the party guilty

of illegally seizing the party from obtaining return of any bond posted before the merits of the pre-judgment seizure can be decided. All of these things make a mockery of due process and throughout these proceedings that was evident. Yet so many American judges went out of their way not to see -- to make of an Asian-American man whose small business was seized and destroyed as a result an invisible man. Justice should be blind, it is true, but only in balancing rights, blind as to favoritism for either side. Justice should not be so blind as to not see an entire race of overachieving American citizens. And yet that is the inescapable conclusion one must draw in studying this case. For even one of the most able of the Superior Court judges who handled a hearing in the case of Hoai in the Superior Court of the District of

Columbia,[2] the Honorable George Goodrich was quick to compare this situation to that of the "tong wars", though he, at least, did so totally without malice or bias. But the questions here are not those of internecine ethnic struggle; the

[2]At the time of these events the Superior Court of the District of Columbia had an incredibly inefficient system under which absent a "Calendar I Assignment" in a case as complex as this Hoai litigation, which has several branches in several courts, every motion was considered by a new and different one of over 50 judges, and if heard, was heard by a judge who had no previous familiarity with the facts of the case. This system, by a change in the rules of that court of which this Court, like any other, may take notice, has now, to the credit of the Superior Court's chief judge and administrators, been mercifully changed, effective January 1, 1990. Even though the Hoai litigation in that court was ultimately moved onto the then Civil I calendar by Hoai's counsel and placed before one judge, the first judge to be assigned it after that status was achieved, viciously attacked Mr. Hoai's attorneys for daring to take advantage of that provision designed for just such complex litigation as this and suggested that they ought to be sanctioned, a suggestion and quotation seized upon by his opponents in this and all the other branches of his litigation and inserted in the record at every available opportunity.

questions before this court concern why, when an Asian-American does turn to the courts of this country to right wrongs which have damaged him and injured him, destroying his business and career, he should be treated in a way so different from what has been the custom dictated in the lower courts by the decisions of this Court for the past forty years. The applicable precedent of this Court developed over forty years of interpretation of the civil rights laws as protective of fundamental federal rights. The resulting decisions and the general practices of the lower courts following those decisions have made customary in our courts certain basic principles of due process and the hearing of cases on their merits. It is particularly shocking that what has happened in this case has happened in the nation's capital, not in the outlying reaches of the country. Yet the techni-

ques employed below are precisely those of justice delayed, deferred, and of merits buried with procedural technicalities, technicalities that are applied with a prior purpose in mind that is not compatible with a blind and equal application of the laws. That purpose is manifestly to avoid the merits of the cause. Thus, what is evident on this record is the tactics not only by the opponents but by members of the judiciary also that were storied in the South for many years. The members of the Asian-American community admire the laws of this great land. We have, they say, many wonderful laws in this country. But they wonder why we do not apply them. Over the past forty years this Court has done much to inspire all who come here and all who wish to come here in the future by the shining example of our elevation of individual rights and liberties above transient politics of the

moment, above the petty corruptions of humankind. Yet here we see a manifest failure to apply those laws as set out by this Court and, disturbingly, an assumption that a Vietnamese-American, an Asian-American, will be able to do nothing to see that they are enforced. The rules of this Court specifically state that in instances where a United States Court of Appeals has either departed far from the accepted and usual course of proceedings, or has sanctioned such a departure by a United States District Court and done so so far as to call for the supervision of this Court, then the writ will be granted. Rule 10.1 (a). That is the case here. Further, the decision below in this instance not only departs so far from the accepted and usual course as to call for this Court's supervision, it also condones in the court below and itself conflicts with numerous applicable decisions of this

Court and for that reason, as noted, requires the issuance of the writ in this instance.

It is now too late too turn back the clock on civil rights. The promise embodied in the Declaration of Independence of inalienable rights, the framework designed to allow their development in the Constitution and the specific guarantees of that Great Instrument, all have been fulfilled in the great Civil Rights struggle of the last forty years. The American South has largely been freed from the burden of bigotry that lay heavy upon it. But now is the time of great danger. For yesterday's reformers, yesterday's oppressed, are now ensconced here in Washington, D.C. as the Nation's establishment. Let not their success be an ending and let not others who come after them in the great tides of immigration and assimilation be disappointed in their,

equally worthy, quest. Let them see the fulfillment and extension of that which was admirable in the great Civil Rights struggle. For those formerly denied participation in the dream must move on with its changes and the dream itself must always include, not exclude. This case is about that dream, which must not be made captive of any establishment, but must ever remain available for all Americans.

PURPOSE OF THE BRIEF AMICUS CURIAE

The Vietnamese Community recognizes that the petitioners have ably argued their own personal interests in having the Court issue the writ of certiorari as fully as they could have done under the circumstances. Yet the very tactics of the judges below in diverting attention from the governing issues and avoiding focusing upon them naturally prevented the petitioners from engaging the absolute core issues here in the depth that the

Court would normally require. This is particularly true with regard to the castigation of the appellants in the opinion below for reliance upon Lugar v Edmondson Oil Co. (1982) 457 US 922, which the appellate court pejoratively and somewhat contemptously characterized as a "sole reliance". (A-17) Does not the analysis in that case embody all of the important law in this vital area that went before ? We think so, and we think that the purpose of the appellate panel to thus trivialize by contempt for a justifiable reliance, coupled with its tactics of diversion from the issues presented by that case was exposed by its cursory dismissal in a footnote of the continuation of this Court's analysis in this important area of state action analysis in the judicial arena in the providentially intervening decision in Edmonson v Leesville Concrete Co. (1991) 500 US ____, 114 Led2d

660. What is wrong with relying on a case that is well written and dispositive of the issue at the time ? We would hope that this Court would give the signal that in the future such transparent tactics, reminiscent of the early days of the civil rights struggle, will not be tolerated in the Nation's Capital, of all venues. Asian-Americans are not fooled by the tactic of creating such an atmosphere of hostility and attack, as if a litigant did not count, that the litigant is hard-pressed to present the issues of the case for having to contest both the court below and his opponents in the case. Admittedly, the attorneys assisting the litigant here were not members of the civil rights establishment. And the record reveals that when they were compelled to file the complaint in question here they were busy in the companion case before the same judge. In that PMPA case, pursuant to or-

der, Sunoco had just filed a summary judgment motion and also an unordered motion for leave to file an amended answer, both of which had answers then almost immediately due. All of the established civil rights organizations refused to give assistance. Yet, as the accompanying brief shows the resulting complaint dces not have the defects ascribed to it by the appellate panel under an Edmonson-Lugar analysis, despite the modesty of Mr. Hoai's counsel concerning its quality, at least with regard to the 42 U.S.C. 1983 allegations.

Through its annexed brief amicus curiae the Vietnamese Community hopes to provide this Court with convincing evidence that the appeals panel was not only seriously in conflict with the applicable decisions of this Court in its manner of treating the complaint under Conley v Gibson (1957) 355 US 41 as petitioners have ably pointed

out, and not only departed from the accepted and usual course of proceedings in the federal courts in dealing with this complaint by an Asian-American civil rights litigant so far as to call for this Court's supervision, but also that this is true substantively under these recent cases in the developing area of 42 U.S.C. 1983 urisprudence, particularly as it concerns the area of state action by or jointly with or under the authority of the state judicial branches, and that, further, there is substantively an undecided question here sufficiently important to call for this Court issuing the writ of certiorari, one that shows that far from relying upon Lugar alone the appellants were relying upon a major and developing line of cases which this Court is even now carrying forward to a logical conclusion which will necessarily involve some of the questions presented here.

WHEREFORE, the Vietnamese Community prays that this Court grant its motion, and permit the filing of the annexed brief amicus curiae.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States mail, first class, postage prepaid, true and accurate copies, 3 each, of the foregoing motion this 20th day of March, 1992, to each of the following counsel of record below:

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INTEREST OF THE AMICUS CURIAE

The interest of the Vietnamese Community as amicus curiae appears in its motion for leave to file this brief, ante.

ARGUMENT

This case is manifestly about whether, in a continuation of the analysis which this Court recently carried forward in its opinions in Edmonson v Leesville Concrete, infra and Connecticut v Doehr, infra an appeals court may freely ignore and conflict with a host of decisions of this Court and, in doing so, may so far depart from the accepted and usual course of judicial proceedings in the reading of complaints in the face of dispositive motions and the treatment of civil rights generally where an emerging minority group is concerned as to escape the supervision of this Court when such supervision is in order. It raises an undecided question which this Court should decide concerning

the use of secondary procedures of a court to bypass the preliminary injunction and pre-judgment attachment procedures in order to bypass and thereby obviate the constitutional safeguards which this Court has placed upon such primary procedures.

Petitioners have pointed out that here the courts below did not face the question of whether the rules and customs of the Superior Court and the law of the District as applied in that court which were used to take Mr. Hoai's gas station franchise from him in order that it might be bestowed upon Mr. Vo did present a violation of 42 U.S.C. 1983. Instead the courts below went out of their way to rationalize not allowing the consideration of these laws, rules and customs as they are.

An examination of the substance of this D.C. law, rule and custom reveals that had it been examined petitioners had a case. A proper understanding of this underlying

case is important because the question of whether it should have been examined, while important, nonetheless cannot help but be colored by the strength of the merits of that case. By examining the brutal nature of the deprivation of property without due process in this instance, we can see, just as the smooth procedural talk of a former era covered over the deprivation of life and liberty without due process in cases such as Screws v United States (1945) 325 US 91, 65 SCt 1031, just how much evasion was going on below here. For the rationales advanced by the court of appeals in this instance have precisely the same sort of reasoning as those struck down by this Court in Screws. What made this error so obvious and egregious here was the intervening decision of this Court in Edmonson v. Leesville Concrete Co. (1991) 500 US ___, 114 Led2d 660, (decided June 3, 1991, between

oral argument and the decision below) whose actual implications for this case the appeals court declined to consider, despite being petitioned to do so. Also decided in that intervening time was Connecticut v Doehr (1991) 501 US ___, 115 Led2d 1, which the court below did not address but which we discuss here, since it showed that the type of underlying claim used here would not justify the type of unconstitutional property seizure enabled by the D.C. court procedures and law. Moreover, as we shall show, there were allegations of the complaint denoting the actual case which the petitioners did not have room in their brief to cover and which the Court should consider.

Petitioners, bound by space limitations, were not able to focus upon the need to apply the state action analysis of Edmonson. Yet they had petitioned the court of appeals for a rehearing based on that

intervening decision so that the framework articulated in that case might be applied here. A-579 ff., A-582 ff. As this case exhibits a situation much like that of Terry v Adams, infra as it followed Smith v Allwright, infra (as we discuss below,) this case should be heard to impress upon lower courts that ducking the issues in this way, in conflict with applicable decisions of this Court, and the condoning of the use of secondary procedures and laws to avoid constitutional safeguards built into primary procedures as was done here here will not be permitted. This evasion of constitutional responsibilities must be eliminated, precisely as such subterfuge was struck down in Terry.

The Edmonson decision crystalizes a long line of thoughtful cases contemplating these problems and the refusal to treat it seriously and in depth in a case in which it so providently applies at the crucial

juncture is a clear example of a court of appeals both making a decision upon a federal question that conflicts with applicable decisions of this Court (here a line of cases that was clarified even while the opinion below was being written) and failing to follow the usual course of judicial proceedings so as to call for the supervision of this Court. For, in failing to apply the Edmonson state action analysis, the appeals court also ignored standard rules for interpreting the pleadings in favor of the plaintiffs upon a motion to dismiss and the standard of Conley v Gibson (1957) 355 US 41, in particular. In order to stretch its decision so that its conflict with the applicable decisions of this Court might not be so apparent, the appellate court distorted the factual pattern in this case in a manner departing from customary procedures in order to fit its procrustean analysis. It created a

need for the exercise of the supervisory powers of this Court, particularly where Asian-American civil rights litigants are concerned. For they too pursue the dream and are entitled to build on the precedent that has gone before in seeking their remedies, not be blocked with deviations from that precedent.

Edmonson further defined the framework for state action analysis set forth in Lugar in a manner that directly applies, but which the appellate court refused to adopt. In a footnote the intervening analysis was cursorily dismissed with the following comment:

> At the same time, Edmonson reaffirms the basic principle that private use of state legal procedures does not rise to the level of state action absent "the overt, significant assistance of state officials." See id., slip op. at 7 (citation omitted). Because the peremptory challenge system "simply could not exist" without the direct and indispensable participation of the state and, more particularly, of the judge, the Court found the requisite "significant assistance" in Edmonson. Id. at 7-9. In the instant

> case, by contrast, such meaningful assistance is never alleged, and Edmonson is, therefore, inapplicable.

The footnote attempts, in the first sentence above, to judge the merits while purporting not to do so. It implies that all that occurred here was routine private use of the court system and that there was no overt, significant assistance of state officials. The first implication, as we will show, is not accurate, and the second is both inaccurate and not completely applicable. But immediately the footnote itself fails to support these implications because it then speaks, not of what could have been shown had the petitioners been allowed to support the general allegations of the complaint which the appeals court was avoiding, but rather of what the petitioners ostensibly failed to allege. The conclusion is that Edmonson is inapplicable, not because it does not apply on the merits of the case as might be

proven on behalf of Mr. Hoai and his colleagues, but rather because something called "meaningful assistance" is "never alleged". The footnote shows indifference to whether a case can be proven in support of the allegations of the complaint or not. As petitioners point out in their brief, having ignored those allegations of the complaint which do assert that the wrongs complained of were committed under color and authority of the laws and which could be supported by the actual facts, the appeals court then used its selective reading of the complaint to imply a lack of merit to the case which it then attempts to justify by pointing to its selective reading of the complaint as if it had actually read the complaint as required by the long standing practices of the federal courts. This is clearly not to read the complaint in favor of the plaintiffs but rather to depart from ac-

cepted precedent in order not to do so. The appeals court both rendered a decision substantively in conflict with applicable precedent of this Court, (particularly that just then being decided,) and, in the manner in which it read the complaint, varied sufficiently far from the accepted and usual course of judicial proceedings as to call for the supervision of this Court. There is also such a departure with regard to the way complaints are read and decided upon in the face of a dismissal motion using extensive material outside the record which the judge then relies upon. This is with regard to a minority group -- Asian-Americans -- which is just emerging as a participant in the struggle to preserve its people's civil rights in the courts and whose members are entitled to more than the "invisible man" treatment accorded here.

A meaningful analysis, in accord with the numerous decisions of this Court upon a procedure which allows attachment or seizure of property prior to judgment or its equivalent must begin with the framework of rules, law and Superior Court customs which are claimed to have provided the color and authority of District law used to deprive the complainants of their federal rights by such a seizure or attachment. In this case the petitioners, as plaintiffs below, alleged that they were deprived of their federal rights and privileges by a certain procedure of the Superior Court, namely, that of the entry of a "consent order." A-392-95, complaint

below, paras. 38-44.[1] It is pointed out in paras. 16-17 (A-378-79) that respondents Zulli and Wagner "participated actively in the decision to use the color and authority of state law to deprive plaintiffs of rights, privileges, immunities and property under color of D.C. law..." In para. 18 it is alleged further that respondent Forester did likewise. A-379-80. Para. 34 of the complaint alleged that Hoai was deprived of John D. Hemenway as his counsel of choice at the crucial

[1]As the petitioners have pointed out in their brief, they did allege that what was done was done under the color and authority of the rules, regulations, law and customs of the Superior Court. Some of the allegations were detailed, as these concerning the use of the consent order procedures, others were general and petitioners did not specifically name the enabling Rule, 12-I(b), of the Superior Court as it then stood. We will not reiterate here what petitioners pointed out about the selective nature of the "seeing" engaged in by both courts below but will rather give an accurate analysis of the framework of laws, customs and rules actually involved, all of which, we hasten to add, are matters of which any federal court may take notice.

juncture "under color and authority of the laws, regulations or rules, and customs of the District of Columbia." The use of consent orders, as in any court, in the Superior Court is a law and custom. It is fully alleged in the above paragraphs how it was entered and, though a private agreement, became a full judgment as any other of that court, signed by a judge. This, of course, had to involve procedures and rules of that court as well as the full participation of one of its judges who, indeed, is alleged to have signed the private agreement between the respondents and thereby made it a judgment like any other judgment, surely a use of the color and authority of the Superior Court. Here the entry of the consent judgment was empowered by a particular rule, the Judge-in-Chambers rule, Rule 12-I(b) of the Rules of Civil Procedure of the Superior Court as it then stood. C-11

It is precisely alleged (para. 43, A-394-95) that by this "device" the respondents thereby obtained "the color and authority of the laws, regulations and customs of the District of Columbia in order to deprive plaintiffs of their property, rights, privileges and immunites as complained of herein." Here it is alleged (para. 43, A-397) that these things violated the due process clause and the petitioners' right to petition for redress under the Constitution and, further, (para. 44, A-397) that this was done by the "very color of law and apparent authority of the Superior Court to deprive the plaintiff Hoai of those important rights, privileges and immunities and of his property the gas station franchise." It would seem to be far too late in the day to hold that because the particular Rule was not actually cited by name and number the petitioners are out of court.

This would seem to be a throwback to a "single misstep is fatal" type of pleading, relying overmuch on technicalities to eliminate just complaints, that has long since ceased to be the practice in the federal courts.

Though some of this ground was covered by the petitioners in their brief, they had not room to point out the emphasis on the use of the consent order procedure of the Superior Court, something which was thoroughly alleged and just as thoroughly ignored (though clearly understood) by the courts below. The point of this case is not that the respondents made use of a pre-judgment attachment or seizure provision as such of the type at issue in Sniadach v Family Finance Corporation (1969) 395 US 337, or in Fuentes v Shevin (1972) 407 US 67 or in Lugar v Edmonston Oil Co. (1981) 457 US 922, all of which this Court found to violate due process

rights and therefore present a 42 U.S.C. 1983 cause of action, or even that they made use of an arguably violative attachment procedure such as was at issue in Mitchell v W.T. Grant Company (1974) 416 US 600, which was upheld. For it was the use of this procedure in tandem with Superior Court Rule 12 -I(b) as it then existed, (C-11) which created the unconstitutional procedure complained of. This procedure allowed respondents to bypass the requirements of Rule 65 of the Superior Court (which was Federal Rule of Civil Procedure 65 with slight modifications) with its safeguards against improper injunctive seizure of property prior to trial and the local rule on pre-

judgment attachments as well.[2]

Thus the question in this case, unlike that in those cited above, is not whether the procedures for prejudgment attachment or garnishment or replevin are constitutionally defective, but whether the procedures of the Superior Court which the respondents successfully used to avoid those procedures and the procedures attending Rule 65 were constitutionally defective and whether their use by the respondents provided a cause of action against them. In this the present case is remarkably similar to the subject of this Court's opinion in the Jaybird Party case, Terry v Adams (1953) 345 US 461. In that

[2]The rules of the District of Columbia Superior Court regarding attachment before judgment and replevin and the corresponding D.C. Statutes, are reproduced in the back of this volume. The Court can see that they are carefully structured to comply with the Court's holdings in Sniadach and Fuentes, supra and indeed the official comment refers the reader of these rules to that authority. So it is clear what the respondents were avoiding here.

case this Court dealt with the problem presented by the fact that it had struck down the practice of barring African-Americans from primaries then practiced by the European-Americans of Texas in a series of decisions; yet the Euro-Americans of one Texas county, through what they claimed was purely private activity, achieved the same result -- a segregated primary that rendered the African-American vote completely ineffective. Originally, in Nixon v Herndon (1924) 273 US 536, this Court struck down as violating the 15th Amendment a Texas statute that a Negro could not vote in a Democratic Party primary election in the state. The Texas legislature then reenacted the statute in a slightly different form to give the State Executive Committee of the Democratic Party the power to prescribe the qualifications of its members for voting or other participa-

tion. The State Executive Committee of the Democratic Party then adopted a resolution that no one but white Democrats might participate in the party's primaries. This Court struck down this obvious subterfuge in Nixon v Condon 286 US 73, finding that, albeit delegated, this was still state action and hence still violative of the 15th Amendment. Next the Texas Supreme Court found that political parties were voluntary associations, private voluntary associations and the Democratic Party in a convention adopted a resolution that declared that its membership was open to whites. This too was struck down by this Court in Smith v Allwright (1944) 321 US 654 where it found that the Democratic Party, for purposes of the primary, was an agency of the state of Texas. Finally, in Terry this Court found that the reach of the 15th Amendment could not be evaded by the

Jaybirds of Fort Bend County, Texas, who created their own primary, held just before the legitimately authorized one of the State, and made sure that the winner of their "private" primary always won the official, statutorily authorized primary a few weeks later. This Court found that this subterfuge did not succeed in removing the Democratic Party and its members who made up the overlapping and controlling Jaybird Party from the reach of the 15th Amendment. Following intervening precedent from the 4th Circuit that a State cannot nullify the constitutional rights of Negroes to vote in primaries by casting their electoral process in a form which permits a private organization to practice racial discrimination in the primary election, the Court found that a State which, by circumvention, allows that which is the equivalent of a segregated primary still violates the 15th Amendment.

Mr. Justice Frankfurter, in particular, found that "the State authority has come into play." The State of Texas, he found, had entered into a comprehensive scheme of regulation of primaries and, as a result of the earlier cases, Texas officially by statute banned segregation from its official primaries. Because the same officials participated in the Jaybird primary as ran and participated in the official primary, the Jaybird operators could not divest themselves of State authority.

With some variations, which we will discuss below, that is what happened here. The District of Columbia has a comprehensive scheme for assuring that there are not pre-judgment attachments or seizures of property without all the safeguards of due process. Indeed the preliminary injunction rule, Rule 65 of the Superior Court, which is the same as the federal rule with only a few exceptions, and Rule

64, 64-I regarding attachments before judgment, and Rule 64-II governing replevin, are all placed together in the Superior Court rules with Rule 65 to make a comprehensive scheme governing all taking of what is arguably the property of another before judgment. Yet, just as Texas had a comprehensive scheme, as a result of this Court's earlier decisions, which statutorily purported to bar the exclusion of blacks from primaries and yet enabled the Jaybird Party to do just that through its officials in charge of the primaries, so there were rules, law, and customs of the Superior Court here that allowed parties to bypass the safeguards of Rule 65 and Rules 64-I and II and the statutes and law behind those rules.

Just as the Jaybird Party claimed to be a private association carrying out private acts, so the respondents here claim they were private individuals carrying out pri-

vate acts, making routine use of the processes of the Superior Court. And, indeed, a large part of the appellate opinion rests upon this premise.[3] However, (and this is what the appellate court so resolutely ignored) what was involved here was the use by the respondents of procedures provided by the court rules and laws of the District of Columbia to evade and get around the strictures attendant upon a normal progression under Rule 65, with all of the safeguards built in to that rule. And this is the course which the respondents were embarked upon when they decided to use the "back door" provided by Rule 12-I(b) as it then stood

[3]Thus belying the appellate opinion's claim that it rests only upon the allegations of the complaint. It is apparent that the appellate opinion only uses this claim -- that it rests solely upon the allegations of the complaint, without going to the merits -- to harm the respondents' cause and that, by contrast, the underlying merits are referred to in order to justify the decision to bury respondents' case so that its merits will not be heard.

and the consent order procedures of the Superior Court. In his sworn affidavit which was before the district court judge, attorney Wagner of Sunoco admitted that the purpose of the procedures used was to avoid the preliminary injunction hearing required by Rule 65, saying:

> Mr. Roseman inquired whether Sun would be willing to consent to an extension of that provision of the temporary restraining order which required Sun to continue to supply petroleum products until further order of the court in lieu of proceeding with a preliminary injunction hearing. A-472-73,

This affidavit was before Judge Oberdorfer in the related Petroleum Marketing Practices Act ("PMPA") case of Hoai against Sun, in which he granted summary judgment on liability to Hoai after Hoai's motion had been pending over a year and a half. On the same day he issued the order dismissing this case and demanded a show cause as to why Hoai's attorneys should not be sanctioned, ignoring the outstand-

ing motions to stay matters in this case until the impact of the pending PMPA decision could be absorbed into it, motions he has never decided. Hoai v Sun Refining & Marketing Co., Inc. U.S.D.C. D.C. CA 87-2456. The PMPA outcome was compelled by the intermediate reversal of Judge Oberdorfer's sua sponte abstention in that case as reported in Hoai v Sun Refining & Marketing Co., Inc. (CA DC 1989) 866 F2d 1515. Subsequently, in the PMPA case on remand, Mr. Roseman himself was deposed and his version of this evasion is now a matter of record in that case, viz:

> During the course of my conversations with Mr. Wagner, we discussed the possibility of settling the dispute immediately before, immediately before the court involving the temporary restraining order and avoiding the necessity to go to a preliminary injunction hearing following the entry of the temporary restraining order. Deposition testimony of David C. Roseman in CA 87-2456, June 25, 1991, p. 12 as filed in that case.

A few pages later, p. 15, this purpose to evade the constitutional strictures of Rule 65 was confirmed, viz:

> Q You mentioned that there came a time in your conversation with Mr. Wagner when you discussed the possibility of avoiding a follow-on preliminary injunction hearing. Did I understand that correctly ?
>
> A That's correct.
>
> Q When did that occur, in this same conversation or a later conversation ?
>
> A That would have been in the first conversation. Well, let me take that back. I can't say for certain that it was the first conversation. It may have been in another conversation shortly after that initial telephone call but it was quite early on following the TRO hearing.

So that it can readily be seen that within a few days after the TRO hearing on August 29, 1986 the parties respondent were beginning to work together to bypass the procedures of Rule 65 with its built in Constitutional safeguards. This is quite similar to the way that the Jaybirds of Fort Bend County, Texas, set themselves up

to bypass the constitutional requirements which they correctly foresaw would require them to admit negroes to vote in the primary if they used the official statutes set up to govern the primaries overtly. This bypass itself, however, involved two laws and regulations of the court, the consent judgment procedure and the judge-in-chambers procedure of then Rule 12-I(b), and particularly the latter's sanction and mandate for ex parte decisions on whatever the sitting judge-in-chambers found appropriate, completely without governing standards or control. C-11.

Thus, the attorneys Roseman and Wagner were setting up almost immediately after the TRO hearing to work together to bypass the constitutionally required follow-on preliminary injunction hearing under Rule 65 and eliminate any notice to or participation by the petitioners on what would happen to Mr. Hoai's franchise. When,

shortly thereafter, they agreed between themselves to terminate Mr. Hoai's franchise and give it to Mr. Vo., they, therefore, did so specifically to avoid the requirements of Rule 65.[4] Thus, this is manifestly not a case, such as those cited by the appellate panel (A-16, 17) where the respondents were taking "mere recourse

[4] It is now a matter of res judicata that Sun terminated Hoai's franchise by the activities of September 8, 1986 culminating in the entry of the consent order (A-465) which, by its terms, was cast as an extension of the TRO (A-461). This was taken notice of in this case in the appeals court, Hoai v Vo (CA DC 1991) 935 F2d 308, 311, n.1, in noting that summary judgment as to illegal termination by Sun had been granted. Thus, it is also now res judicata, since Hoai was the franchisee until terminated by Sun, that Vo never had any legitimate claim to be in control of the franchise and was a mere scrambler in the station. Since the TRO, by its terms, is based on the tort of wrongful eviction, a tort only available to a tenant against a landlord, the findings of the TRO judge, which were purely procedural in that they would have required Sun, then Hoai's co-defendant, to evict Vo through the summary procedures of the Landlord and Tenant branch of the Superior Court, were clearly erroneous and the TRO was groundless in the first instance.

to state or local procedures" as posited by the appellate panel in passing on the merits of the claim while purporting not to do so. Rather this is plainly a case where the wrongdoers, resorting "merely" to the court procedures used still other court procedures to bypass the procedures which the respondent Vo and his counsels Roseman and Ottman had originally "merely" resorted to, once they saw that they might not succeed with the procedures originally chosen. The complaint here is that, having resorted to Rule 65, respondents then used other procedures of the Superior Court, local to it, to bypass the constitutional safeguards built into the procedures of Rule 65 and allied rules.

It is the law of the District that every attorney, as an officer of the court, is charged with a knowledge of its rules. Lynch v Meridian Hill Studio Apartments (DCCA 1985) 491 A2d 515, 518-20. Though

that would almost seeem to go without saying. It is similarly the law of federal practice, known to all who practice under the federal rules, that Rule 65 provides for a TRO on a temporary, emergency basis in unusual circumstances only because a TRO is indeed temporary and cannot last unless the party obtaining it can, at a follow-on preliminary injunction hearing prove his or her entitlement to a preliminary injunction. Indeed, the TRO judge below promised Mr. Hoai on the record during the TRO proceedings that he would have a follow-on preliminary injunction hearing at which the merits of his

contentions would be heard.[5] Certainly, this Court has long since made it known that the rights of due process, requiring notice and an opportunity to be heard, are inherent in the scheme of Rule 65 and must be adhered to, thus putting all on notice that a failure to comply with these requirements in any proceeding for injunctive relief under Rule 65 violates basic constitutional rights of the affected parties who do not receive notice and are not afforded an opportunity to participate. Granny Goose Foods, Inc. v Brotherhood of Teamsters & Auto Truck Drivers Lo-

[5]THE COURT: ... and this is just the first hearing and no matter what occurs here, whether it is granted or denied, you will have another day in court. 10 days from now or depending on what the outcome is, certainly within the next two weeks, this will not be the only hearing, you will have this hearing and -- before the emergency, then you will have another hearing and that will certainly give you the time that you need. Hon. Annice Wagner addressing petitioner Hoai, transcript of the TRO hearing, Vo v. Sun, District of Columbia Superior Court CA No. 7075-86, pp. 28-29.

cal No. 70 of Alameda County (1974) 415 US 423. There can be no doubt that respondents were using one set of laws and rules of the Superior Court to bypass the constitutional safeguards built into Rule 65.[6] By contrast to Rule 65 there is no equivalent in the Federal Rules of Civil Procedure to Superior Court Rule 12-I(b).

Thus the judgment of the appellate panel here that the respondents were engaged in "mere recourse to state or local court procedures" which attempts to dispose of petitioners' case fully on its merits without purporting to do so (A-16-17) is not supported by what actually occurred

[6]It should be noted here that D.C. Code §11-946 (1981) provides: "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure ... unless it prescribes or adopts rules which modify those Rules." The official note to Superior Court Rule 65 states: "COMMENT: Identical to Federal Rule of Civil Procedure 65 except for ..." and then there follows some modifications not pertinent here. In the opinions of the D.C. Court of Appeals federal case law on the federal rules is relied upon and cited in interpreting D.C. Rules.

here, a truth which both courts below seemed quite anxious to avoid. And, as one would expect, the authority cited in support of this mischaracterization does not embody fact situations similar to the present one. This authority consists of this Court's opinion in Dennis v Sparks (1980) 449 US 24, 28; Crabtree v Muchmore (CA10 1990) 904 F2d 1475, 1476; Jones v Poindexter (CA 4 1990) 903 F2d 1006, 1010-11; and Tunstall v Office of Judicial Support (CA3 1987) 820 F2d 631, 634. An examination of these cases, however, reveals that none of them involve a situation where parties and counsel, having initiated a court procedure with constitutional safeguards, then elected to bypass the constitutional safeguards of that procedure through the device of other procedures of the same court that eliminated those constitutional safeguards and in so doing did violate the rights, including

due process, of other parties.

The opinion in Dennis v Sparks involves the questions presented when individuals conspire together to bribe, and do bribe, a judge. It is true that in that case this Court did indeed state that "merely resorting to the courts and being on the winning side of a law suit does not make a party a co-conspirator or a joint actor with the judge." 449 US at 27-8. But then it went on to state:

> But here the allegations were that an official act of the defendant judge was the product of a corrupt conspiracy involving bribery of the judge. Under these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's action or that of his co-conspirators.

The plaintiffs here, recognizing the judge's common law immunity even were he culpable (and it appears he was merely negligent) sued only the parties who used

the procedures, just as in Lugar. But here the procedures themselves are under attack, which was not the case in Dennis.

What Dennis v Sparks did establish was liability under 42 U.S.C. 1983 for the misuse of court procedures or authority when there is joint participation. It did not deal with the question of the misuse of defective court procedures that are themselves creatures of the law of the state. In Crabtree, the court did not favor us with sufficient facts to find out what the basis of the complaint really was. It appears to have been one of joint action between the private party defendants and the judge and not in any way to have involved either a): avoiding a procedure of the court so as to nullify constitutional safeguards or b): to have involved a substituted set of procedures used to get around procedures that would have protected against the alleged viola-

tions. Similarly, the citation of the Jones v Poindexter case turns out to be more of the selective reading of the complaint addressed by petitioners in their brief. In Jones that branch of a Lugar analysis which addresses the illegal use of otherwise sustainable state procedures is addressed, not the other branch of the Lugar analysis that produced a victory for Mr. Lugar in that case, namely his attack on state procedures that was sustained. Certainly in Jones there was absolutely no question of using one set of the court's procedures to evade the constitutional safeguards of another set of procedures that had been chosen by the party complained about. In the Tunstall case it was specifically held that the case did not involve any seizure of property with the aid of state procedures or any claim of a preexisting debt such as Vo was making here in his Superior Court suit.

We turn then from this inapplicable authority and the rule which was bypassed with its attendant Constitutional safeguards to the laws and procedures of the Superior Court which were used to do the bypassing and thus place Mr. Hoai, with regard to his due process rights, in the same position in which Mr. Terry was placed with regard to his right to have a meaningful vote in the primary elections of the Democratic Party of Texas.

The petitioners have pointed out in their brief the extraordinary diversion from the issues that went on in the panel hearing in this case. They also have pointed out the selective reading of the complaint in both courts below in which the allegations of the violations of local rules, law and practices (i.e., Rule 65) were emphasized as if they were the only allegations and the allegations that the very violations themselves, both of state

and federal law, were done under other color and authority of the laws and customs of the Superior Court, were ignored. We have pointed out how the allegations concerning the use of the consent judgment procedures of the Superior Court were ignored by the appellate panel.

In the District consent decrees are both a contract and a judgment when rendered in a competent court by consent of the parties. Bloedorn v Bloedorn (1935) 64 AppDC 199, 76 F2d 812, cert den 295 US 746, 79 Led 1691, 55 SCt 658. Although here it was recognized prior to the dismissal of this civil rights suit, in the related PMPA suit by the court of appeals, that the consent decree here represented no "independent judgment" of the Superior Court, those words were very carefully chosen by the appellate judge to indicate that it was not an independent judgment, not that it was not a judgment. Hoai v

Sun Refining & Marketing Co., Inc. (CA DC 1989) 866 F2d 1515, 1519. Nonetheless, though a consent order is not an exercise of independent judgment it is still, once it is signed by a judge, a judgment, and, as such, is just as binding on the parties entering into it and their privies, as here Hoai was a privy with Sunoco. This is as true in the District as elsewhere. Universal C.I.T. Credit Corp. v Gogos (MCA 1962) 184 A2d 197, 198. This Court has long recognized "that judicial action is to be regarded as action of the State for purposes of the Fourteenth Amendment." Shelley v Kraemer (1948) 334 US 1, 15 and numerous cases cited therein on this point. In the District, of course, it is the 5th Amendment rather than the 14th that furnishes the due process requirement. But the state action analysis would be the same. Lugar, of course, makes clear that the state action analysis of

the 14th Amendment for the purposes here is the same as it is for the "color and authority of state law" analysis under 42 U.S.C. 1983. Hence, a judicial procedure which enables attachment before judgment in the manner analyzed in Edmonson, Doehr and the cases leading up to them raises questions of misuse of color and authority of state law under 42 U.S.C. 1983.

Here the procedure was a combination of consent judgment with Rule 12-I(b), which, as petitioners have shown, contained language allowing the judge-in-chambers to do ex parte whatever he felt was "appropriate for such disposition", and to issue TRO's without any check on that procedure, which, in this case was taken to include "extending" one contradictorily to the promises of the judge that had issued it and without any concern for Mr. Hoai as the party most affected. It was a rule without controlling standards and no

qualifications to ensure due process or any other federal privilege, immunity or right. In Mitchell, supra this Court recognized the necessity for procedures enabling private, ex parte attachment or seizure, in that case the Louisiana writ of sequestration, to be "narrowly confined" (Id. at 617) if they are to pass constitutional muster. Former Rule 12-I(b) of the Superior Court of the District of Columbia was so broad and loose that it was modified effective January 1, 1991 to eliminate completely the authority to issue Temporary Restraining Orders and the broad, loose, completely uncontrolled delegation of authority in the language: "orders involving executions upon attachments, and any other matters appropriate for such disposition." In place of this broad, uncontrolled authority, the judge-in-chambers is now authorized to carry out the following, narrow functions:

> Approval of accounts, warrants and return of warrants, approval of subpoenas for administrative proceedings, applications for appointment of special process servers in small claims cases, applications for name change, petitions to release mechanic's liens, applications for entry of administrative agencies' final orders as judgments, petitions to take depositions pursuant to Rule 27 (a), master-meter proceedings under D.C. Code §43-541 et seq. (1981); and requests for issuance of subpoenas under Rule 28-I(b).

It's a long way from TRO's and "other matters appropriate" to "master-meter readings", the distance between lack of constitutionality and that which complies with this Court's mandates of due process.

Regardless of what its intent may have been, Rule 12-I(b) as it was in September, 1986 created a procedure which, when coupled with the consent judgment procedure of the Superior Court, created a completely unchecked avenue for evading the Constitutional restraints controlling preliminary injunction proceedings and the pre-judgment attachment procedures of the

court. But it took a willingness to deliberately choose these procedures to eliminate the safeguards of due process in order to embrace the procedure for such purposes to achieve what occurred here. This is precisely then, in relation to this Court's line of cases embracing formal pre-judgment attachment, seizure and sequestration statutes and procedures, what the Jaybird Party operation of the pre-primary primary was to the laws of Texas regulating primaries -- a bypass.

Was this bypass clothed with the color and authority of the state for 5th Amendment and 42 U.S.C. 1983 purposes ? That is the undecided question of vital import which this Court should take up and decide. It is to that question which the state action analysis of Edmonson, building upon Lugar (as made clear by Doehr in this instance) should be applied. If the respondents had simply bribed the TRO

judge to extend the TRO the way that they did here, their action would be actionable under Dennis v Sparks. If they had used a formal attachment procedure as loose as the procedures they did employ here they would have been liable under Sniadach, Lugar and the other decisions in that line. Judgments are the exclusive preserve of the courts, without which they would have no purpose and meaning. The consent judgment procedure is the only procedure by which private parties may take over the essence of the judge's function and then gain his official imprimatur as the imprimatur of the court upon their private actions. This is delegation to private parties of a power "traditionally exclusively preserved to the State." Here unconstitutional deprivation was permitted to occur "within the courthouse itself". It was an action here that could not have existed, and the procedures enabling it

could not have existed, "without the overt, significant participation of the government." There was authorization by rule of the court enacted pursuant to statute and by established law of the District. An Edmonson analysis is in order: (1) because of the conflict with decisions of this court inherent in what happened here; (2) because to rationalize it the usual course of judicial proceedings were far departed from; and (3) because it presents an undecided question in the same manner that Terry v Adams did, one that is important and should be decided. Finally, it is important that this Court show that Asian-Americans have civil rights also and it will not permit any minority to be treated like Ralph Ellison's "Invisible Man" in the Article I courts of the Nation's Capital.

Respectfully submitted.

THE VIETNAMESE COMMUNITY OF
WASHINGTON, D.C., MARYLAND

AND VIRGINIA

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States mail, first class, postage prepaid, true and accurate copies, 3 each, of the foregoing petition this 19th day of March, 1992, to each of the following counsel of record below:

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Supplemental Appendix of Rules and Statute referred to in Amicus Curiae brief

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SUPERIOR COURT OF D.C. - CIVIL RULES

RULE 64-I

ATTACHMENT BEFORE JUDGMENT

(a) APPLICATION AND NOTICE TO DEFENDANT. An application for a writ of attachment before judgment, shall set forth, by affidavit, specific facts meeting the requirements of D.C. Code §§ 16-501(c) and (d) (1981). The application shall be accompanied by a prepared Notice to Defendant on CA Form 105 supplied by the Clerk. The Clerk shall send such notice to the defendant by first class mail at the address shown on the notice, or in case of a foreign corporation to its registered agent, if any, and shall note on the docket the date of such mailing, if defendant's address is listed on the notice as unknown, the plaintiff shall file with the notice an affidavit setting forth the plaintiff's reasonable efforts

to ascertain defendant's current mailing address.

(b) ISSUANCE. An application for a writ of attachment before judgment shall be submitted to the Civil Calendar Control Judge who may approve or deny issuance or may direct such further hearings before issuance as deemed appropriate.

(c) ANSWER OF GARNISHEE. A garnishee shall file with the Clerk the answer to the interrogatories accompanying the writ of attachment within 10 days after service of the writ upon the garnishee, and shall serve a copy of the answer upon the defendant and upon the party at whose instance the garnishment was issued. If within 10 days after service of the answer to the interrogatories or such later time as the Court may allow, the party at whose instance the garnishment was issued shall not contest the answer to the interrogatories pursuant to D.C. Code §16-522

(1981), the garnishee's obligations under the attachment shall be limited by the garnishee's answer.

(d) HEARING. If a hearing is held as a result of a filing of a traversing affidavit by the defendant or the garnishee pursuant to D.C. Code § 16-506 (1981), the plaintiff shall be required to establish the validity or probable validity of the underlying claim and the existence of the ground for issuing the attachment.

(e) PRIORITY OF LIENS. For purposes of determining priority of successive liens, a writ of attachment issued under section (b) of this rule shall be effective from the date of its delivery to the marshal.

(f) EXPEDITION OF MOTIONS TO QUASH. All motions to quash attachments shall be heard by the Court on an expedited basis. Upon at least three (3) days notice to all parties, the Court may in appropriate cases order that the action in which the

motion was filed be tried on the merits at the same time the motion is heard. (Revised 1/1/82)

(g) DISCOVERY. For good cause shown, the court may in its discretion permit discovery in attachment before judgment proceedings in the manner provided in Rule 69-I.

COMMENT: ... In connection with Rule 64-I, see Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) and Fuentes v. Shevin, 407 U.S. 67 (1972).

RULE 64-II

REPLEVIN ACTIONS

(a) Upon filing any action in replevin and before process therefor is placed in the hands of the U.S. Marshal or other process server, the plaintiff, personally or by the plaintiff's attorney, will bring the action to the attention of the Civil Calendar Control Judge.

(b) At that time the plaintiff may request that the Calendar Control Judge set a date for a hearing at which plaintiff

will be required to establish the probable validity of the plaintiff's claim and defendant will be given an opportunity to appear and be heard with respect to whether a writ of replevin should issue. If, upon such application, the Calendar Control Judge determines that the plaintiff has filed a verified complaint alleging that defendant is wrongfully detaining certain specified property which plaintiff is entitled to possess, the Calendar Control Judge may issue an order directing the defendant to preserve the property which is the subject of the action in the defendant's possession or under the defendant's control so as to keep it amenable to the process of the Court pending further order of the Court. The order will also indicate the date on which plaintiff's application for a writ of replevin will brought on for hearing and will inform the defendant that the

defendant may be heard at that time, with or without witnesses, on whether the writ should issue.

(c) The order shall direct plaintiff to cause a copy of the summons, complaint, and order to be served upon the defendant at least 5 Court days prior to the date set for the hearing. If they are not served by that time, the plaintiff shall apply to the Calendar Control Judge to set a later hearing date which will provide the defendant with sufficient time to make adequate preparation therefor. In any order entered under this Rule, the Calendar Control Judge may include such requirements with respect to the method of service as to accomplish prompt and expeditious notice to the defendant.

(d) At the conclusion of the hearing, the Calendar Control Judge may authorize the issuance and execution of a writ of replevin or may, if it appears just,

permit all or part of the property to remain in the possession of the defendant pending further order of the Court. In the latter event, the Calendar Control Judge may require the defendant to post an appropriate surety bond or other undertaking or may otherwise provide for the protection of the property pursuant to D.C. Code §16-3708.

(e) The Civil Clerk's Office will not process any writ of replevin until its issuance has been approved by the Civil Calendar Control Judge. Plaintiff shall not be obliged to submit the requisite surety bond until such processing takes place.

(f) In making initial application to the Calender Control Judge, plaintiff may apply for issuance of the writ without prior adversary hearing on the ground that there is an immediate danger that the defendant will destroy or conceal the property in

dispute or on any other ground set forth in D.C. Code §16-501(d)(2), (3), (4), or (5)(1981) as a basis for attachment before judgment. Upon such application, supported by affidavit or sworn testimony reciting specific facts which tend to establish the grounds therefor, the Calender Control Judge may, if deemed appropriate, authorize the immediate issuance of the writ prior to the hearing. If the Calender Control Judge authorizes such issuance, the Calender Control Judge shall enter in the record findings of fact and conclusions of law which state the basis of the need for such immediate issuance. The defendant against whom a writ of has been issued in this manner may, on not less than 24 hours notice to the plaintiff, apply to the Court to have the writ vacated. If such writ issues, a hearing shall take place on the 5th Court day after execution of the writ. It shall

be the duty of plaintiff's counsel to notify the Civil Assignment Office promptly of the execution of the writ.

(g) Trial of all actions in replevin, whether on the jury or nonjury calendar, shall be expedited. (Added 3/30/73)

(h) By consent of all parties, the judge conducting a hearing on the issuance vel non of a writ of replevin may try the entire proceeding on the merits in lieu of merely determining whether or not the writ should issue. (Added 3/30/73)

COMMENT: See Fuentes v. Shevin, 407 U.S. 67 (1972). (Added 3/30/73)

Superior Court Rule 12-I(b) as it was amended effective January 1, 1991, eliminating the unconstitutional provisions.

RULE 12-I

MOTIONS PRACTICE

* * * *

(b) JUDGE IN CHAMBERS

(i) The following matters may at any time be presented for disposition to a Judge in Chambers designated by the Chief Judge, either ex parte or with opposing counsel, as appropriate: Approval of accounts, warrants and return of warrants, approval of subpoenas for administrative proceedings, applications for appointment of special process servers in small claims cases, applications for name change, petitions to release mechanic's liens, applications for entry of administrative agencies' final orders as judg-

ments, petitions to take depositions pursuant to Rule 27(a), master-meter proceedings under D.C. Code §43-541 ete seq. (1981); and requests for issuance of subpoenas under Rule 28-I(b).

(ii) The following matters, if presented on the day the complaint is filed, must be presented to the Judge in Chambers; thereafter, such matters must be presented to the judge assigned to the case: appointment of a special process server, motions with respect to publication of notice requirements, judicial approval of settlements involving minors, motions regarding security for costs, writs of ne exeat, applications to set bonds, and applications for temporary restraining orders.

D.C. CODE SECTION:

§16-501. **Attachment before judgment; affidavit and bond**

(a) This section applies to any civil action in the United States District Court of the District of Columbia or the Superior Court of the District of Columbia, for the recovery of:

(1) specific personal property;

(2) a debt; or

(3) damages for the breach of a contract, express or implied.

(b) In an action specified by subsection (a) of this section, the plaintiff, his agent, or attorney, may file an affidavit as provided by subsections (c) and (d) of this section either at the commencement of the action or pending the action.

(c) The affidavit shall comply with the following requirements:

(1) show the grounds of the plaintiffs' claim;

(2) set forth that plaintiff has a just right to recover what is claimed in his complaint;

(3) where the action is to recover specific personal property, state the nature and, according to affiant's belief, the value of the property and the probable amount of damages to which plaintiff is entitled for the detention thereof;

(4) where the action is to recover a debt, state the amount thereof; and

(5) where the action is to recover damages for breach of a contract set out specifically and in detail, the breach complained of and the actual damage resulting therefrom.

(d) The affidavit shall also state one of the following facts with respect to defendant:

(1) defendant is a foreign corporation or is not a resident of the District, or has

been absent therefrom for at least six months;

(2) he evades the service of ordinary process by concealing himself or temporarily withdrawing himself from the District;

(3) he has removed or is about to remove some or all of his property from the District, so as to defeat just demands against him;

(4) he has assigned, conveyed, disposed of, or secreted, or is about to assign, convey, dispose of, or secrete his property with intent to hinder, delay, or defraud his creditors; or

(5) he fraudulently contracted the debt or incurred the obligation respecting which the action is brought.

(e) Before a writ of attachment and garnishment is issued, the plaintiff shall first file in the clerk's office a bond, executed by himself or his agent, with

security to be approved by the clerk, in twice the amount of his claim, conditioned to make good to the defendant all of costs and damages which he may sustain by reason of the wrongful suing out of the attachment; except that in any case in which the plaintiff states in his affidavit that the value of the specified property to be levied upon is less than the amount of his claim, the court may set the amount of such bond in an amount twice the value of the property being attached, and, notwithstanding the provisions of subsection (f) of this section, only the property so specified shall be levied upon; Provided, That the United States marshal may, in his discretion, when levying upon such property, have the same appraised by an independent appraiser retained by the marshal at the expense of the plaintiff. Any such appraisal shall be made at the time the marshal levies upon the property, and the

appraiser shall accompany him for such purpose. If such appraisal has been made, then only such property as may have a value not exceeding one-half of the amount of the bond shall be attached. In the event the appraised value of the property shall be more than one-half the amount of the bond, the marshal may refuse to execute the writ unless and until the amount of the bond is increased so as to be at least twice the value of the property to be attached.

(f) If the plaintiff files an affidavit and bond as provided by this section, the clerk shall issue a writ of attachment and garnishment, to be levied upon as much of the lands, tenements, goods, chattels, and credits of the defendant as may be necessary to satisfy the claim of the plaintiff.